Supreme Court, U.S.
FILED
09-666 DEC 7 - 2009
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

LITHIUM POWER TECHNOLOGIES, INC.
and M. ZAFAR MUNSHI,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL.
ALFRED J. LONGHI and
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether the materiality requirement under the False Claims Act can be satisfied by a mere showing that a false statement had the abstract potential to influence a hypothetical government decisionmaker, without examining the nature of the decisionmaking process and the criteria used by the actual decisionmakers.

2.

Whether, in a summary judgment proceeding, the existence of scienter under the False Claims Act may be inferred as a matter of law from the mere existence of false statements, even though the contractor presents summary judgment evidence to rebut the existence of scienter.

3.

Whether complete disgorgement of all sums paid to a contractor is a proper measure of damages under the False Claims Act, when the contractor was eligible to receive the contract and has fully performed all of the services required by the contract.

QUESTIONS PRESENTED – Continued

4.

Whether federal public policy bars the enforcement of a release and indemnification agreement by the relator in a *qui tam* suit under the False Claims Act, when the relator executed the release after disclosing his allegations to the government, and when enforcement of the release is necessary to prevent a fraud by the relator.

RULE 14.1(B) STATEMENT

All of the parties in the proceeding in the court whose judgment is sought to be reviewed are contained in the caption.

RULE 29.6 STATEMENT

No parent or publicly held company owns more than 10% of the stock of Lithium Power Technologies, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Lithium Power Technologies and M. Zafar Munshi respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit dated July 9, 2009, is officially reported at 575 F.3d 458 (5th Cir. 2009) and is reproduced in the Appendix at App. 1-37.

The district court's opinion and order granting summary judgment with respect to damages dated January 3, 2008, is officially reported at 530 F. Supp. 2d 888 (S.D. Tex. 2008) and is reproduced in the Appendix at App. 39-68.

The district court's opinion and order granting summary judgment with respect to liability dated September 27, 2007, is officially reported at 513 F. Supp. 2d 866 (S.D. Tex. 2008) and is reproduced in the Appendix at App. 69-120.

The district court's opinion and order denying enforcement of the release dated March 23, 2007, is officially reported at 481 F. Supp. 2d 815 and is reproduced in the Appendix at App. 121-39.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was entered on July 9, 2009. The order denying rehearing en banc was entered on September 8, 2009. The petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are 31 U.S.C. § 3729 and 31 U.S.C. § 3730, which are reproduced in the Appendix at App. 142-54. Both statutes were amended in May 2009, while this case was pending on appeal.

STATEMENT OF THE CASE

The Department of Defense offers funding for scientific research for military applications under the Small Business Innovation Research ("SBIR") program. Lithium Power made a number of proposals for SBIR funding over the years. Some of the proposals were funded (thus becoming contracts), and others were not.

This case relates to two sets of SBIR contracts. The first set was funded by the Ballistic Missile Defense Office ("BMDO"), and the second set was funded by the Air Force. These are referred to as the BMDO Phase I and II contracts and the Air Force Phase I and II contracts.

Lithium Power successfully completed all of these contracts. Lithium Power provided reports to the government setting forth the results of the research, along with a number of sample batteries using the new technology. The government accepted all of the reports and batteries without complaint. In fact, the government praised the work done by Lithium Power. At the end of the BMDO Phase I contract, Dr. Scott Roberson trumpeted the success of the work:

> The program was successful as ten operational batteries were fabricated and delivered per contract. The delivered items were the first to incorporate thin film technology into rechargeable batteries which increased the number of charge/discharge cycles by an order of magnitude over existing battery technologies.

R. 3364. At the end of the BMDO Phase II contract, Dr. Dimitrios Lianos stated "I look[ed] through the final report and it looks great. Thanks very much for all your efforts." R. 3366.

At the end of the Air Force Phase I contract, Dr. David Ryan wrote that "All goals have been achieved" and that "Final report has been received

and accepted." R. 3368. During the Air Force Phase II contract, Dr. Ryan wrote that "Your reports are very exciting to read" and that the reports were "excellent." R. 2150. At the end of the Phase II contract, Dr. Ryan wrote that "this is a very impressive final report." R. 3371.

Alfred Longhi, who was a shareholder of Lithium Power at the time, filed this *qui tam* action under the False Claims Act ("FCA") on November 18, 2002. The district court had jurisdiction over the suit pursuant to 31 U.S.C. § 3730(b)(1). As required by the FCA, Longhi filed the lawsuit under seal.

Longhi made extensive allegations of fraud by Lithium Power in connection with a wide range of government research contracts. In particular, Longhi claimed that Lithium Power fraudulently induced BMDO to award the contracts by making false statements about its company history, its facilities, its employees, and its arrangements to use research facilities of third parties. Longhi also claimed that Lithium Power fraudulently induced the Air Force to award contracts by concealing Lithium Power's prior work for BMDO.

After filing the lawsuit, Longhi entered into a business transaction under which he sold his stock in Lithium Power to Dr. Munshi's wife for $80,000.00. Dr. Munshi and his wife were unaware of the lawsuit, which was under seal. The sale agreement contained

both a release and a covenant not to sue by Longhi.[1] Longhi knew that Dr. Munshi and his wife would not have agreed to the sale if they knew that Longhi had filed, or planned to file, a *qui tam* suit. R. 2376-78. Nonetheless, he proceeded with the stock sale even though he had no intention of honoring his contractual promises.

Almost three years later, in September 2005, the United States decided to intervene in some, but not all, of Longhi's claims. At that time, the lawsuit was finally unsealed.

Lithium Power sought to enforce Longhi's release with respect to his personal claims (*i.e.*, the claims that were not being pursued by the government). However, the district court not only refused to enforce

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[1] Paragraph 4(3) of the agreement contains a release and indemnity:

> Seller [Longhi's family trust] and Alfred J. Longhi, Jr. agree to release and hold harmless the Corporation, its shareholders, directors, officers, and employees from any and all pending claims or lawsuits filed by or on its behalf against the Corporation and/or Purchaser or which could have been filed or threatened on its behalf against the Corporation and/or Purchaser.

R. 2342. Paragraph 4(6) of the agreement contains a covenant not to sue:

> Seller and Alfred J. Longhi, Jr. agree not to sue the Corporation, its officers or directors for loss of Alfred J. Longhi Jr.'s job at the Corporation, or for any other matter prior to execution of the Agreement.

R. 2342.

the release; but it dismissed Lithium Power's claims for release and indemnification. App. at 121-39.

The parties filed cross motions with respect to liability. Lithium Power presented summary judgment evidence showing, among other things, that the alleged misrepresentations and omissions were not material and that Lithium Power did not act with the requisite scienter. Nonetheless, the district court granted summary judgment in favor of the government with respect to liability. App. at 69-120.

The government then filed a second summary judgment motion with respect to damages, claiming that Lithium Power was liable for damages based on disgorgement of all sums that it received under the BMDO contracts and the Air Force contracts. The government also sought statutory trebling and penalties under the False Claims Act. The district court granted that motion, which resulted in an award of over $5 million in damages and penalties. App. at 39-68.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit Adopted a Standard for Materiality That Is Contrary to This Court's Precedent, That Is Contrary to the Decisions of Other Courts of Appeals, and That Disregards the Actual Decision-making Processes of the Relevant Government Agencies.

In adopting a new definition of "materiality" under the False Claims Act ("the FCA"), the Fifth Circuit has decided an important issue of federal law that conflicts with the decisions of this Court and other Circuits. Furthermore, the validity of the Fifth Circuit's definition of "materiality" and the proper application of the materiality standard under the FCA are important issues of federal law that have not been, but should be, settled by this Court.

Prior to May 2009, the FCA did not contain an express materiality element. Instead, the statute merely referred to "false or fraudulent claims." *E.g.*, 31 U.S.C. § 3729(a)(1) (amended 2009); App. at 142. Nonetheless, the Circuits universally held that materiality was an element of a claim under the FCA. *E.g.*, *United States ex rel. Berge v. Board of Trustees,* 104 F.3d 1453, 1459 (4th Cir.), *cert. denied,* 522 U.S. 916 (1997).

This Court has addressed the definition of "materiality" on many occasions in connection with similar federal statutes. The general formulation is that a statement is "material" if it has a natural tendency to

influence, or is capable of influencing, the decision of the decisionmaking body to which it is addressed. *E.g., United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. United States*, 485 U.S. 759, 770 (1988). Most of the Circuits have applied that definition of "materiality" to claims under the FCA.[2] *E.g., United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States ex rel. Medshares Management Group, Inc.*, 400 F.3d 428, 445 (6th Cir. 2005); *Berge*, 104 F.3d at 1460. *But see Costner v. URS Consultants, Inc.*, 153 F.3d 667, 677 (8th Cir. 1998) (applying a narrower definition of materiality that is sometimes referred to as "outcome materiality").

In applying that standard, this Court conducts a context-specific analysis that is sensitive to what the relevant government agency is seeking to accomplish by requiring a particular disclosure. In order to determine whether a particular statement has a natural tendency to influence a decisionmaking body, or is capable of influencing a decisionmaking body, it is

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[2] The Fraud Enforcement and Recovery Act of 2009 ("FERA") added a statutory definition of "materiality" to the FCA. 31 U.S.C. § 3729(b)(4) (2009). The new statutory definition does not apply retroactively. 31 U.S.C. § 3729 note (2009). In any event, the new statutory definition tracks the same formulation that this Court used in cases such as *Gaudin* and *Kungys*. The legislative history shows that Congress added the definition as part of a statutory revision addressing this Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). S. Rep. No. 111-10, at 10-12 (2009). There is no indication that Congress intended to address the issue before this Court.

necessary to understand the criteria used by the decisionmaking body and the process through which the decision is made. The Court does not analyze materiality in the abstract.

The Court's approach is illustrated by *Kungys*. That case arose under immigration law. The defendant had falsely stated his date and place of birth on his visa and naturalization applications. The government sought to denaturalize him based on those false statements. The issue before the Court was whether the false statements were material.

The Court was unanimous in approving the definition of materiality set forth above, but there was disagreement on the proper application of that definition. Each of the opinions is nonetheless instructive with respect to the proper application of the definition of materiality.

Justice Scalia, in an opinion joined by Chief Justice Rehnquist and Justice Brennan, found that the false statements were not material. Justice Scalia reasoned that the statements were not relevant to the defendant's qualifications for citizenship and that, if he had disclosed his true place and date of birth, it would not have "predictably" disclosed other facts relevant to his qualifications:

> There has been no suggestion that those facts were themselves relevant to his qualifications for citizenship. Even though they were not, the misrepresentation of them would have a natural tendency to influence the

> citizenship determination, and thus be a misrepresentation of material facts, if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications. But not even that has been found here.

485 U.S. at 774 (opinion of Scalia, J.).

Justice Stevens, in an opinion joined by Justices Marshall and Blackmun, agreed that the statements were not material. However, Justice Stevens objected to the notion that a statement could be material if it "would predictably have disclosed other facts relevant to his qualification." *Id.* at 792-93 (Stevens, J., concurring in the judgment). Justice Stevens stated the test as follows:

> To prove that a misrepresentation was material, the Government must prove that the statement concealed a disqualifying fact or hindered the discovery of a disqualifying fact. . . . Together and separately, the materiality and procurement requirements reflect congressional intent that citizenship status not be taken away unless the Government proves that the person was not qualified to hold that status at the time it was obtained.

Id. at 789 (Stevens, J., concurring in the judgment).

In a dissenting opinion, Justice White argued that the falsity of the statements, by itself, was a material fact because it would have caused the agency to conduct an investigation:

> In other words, the proper inquiry is not only whether the true date and place of birth, in isolation, would have aroused suspicion, but also whether an investigation would have ensued had petitioner revealed the true facts and thereby disclosed the discrepancy between them and the false statements in his supporting documents. Former Ambassador Seymour Maxwell Finger, Vice-Consul in Stuttgart in January 1947, testified that if there were discrepancies between the visa application and the supporting documents an investigation certainly would have occurred, a view that is consistent with the regulations then in effect.

Id. at 809 (White, J., dissenting). Justice O'Connor indicated her agreement with this portion of Justice White's dissent. *Id.* at 801 (O'Connor, J., dissenting in part).

While the members of the Court reached differing conclusions on the application of the definition of materiality under the facts of that case, each of the opinions looked to the context and practical significance of the facts in question. Each opinion examined the purposes of the statute and the goals of the regulatory scheme. Materiality is not an abstract, hypothetical proposition, but instead is a practical, context-specific issue. None of the members of this Court analyzed the issue in the abstract.

In this case, the Fifth Circuit purported to adopt the conventional definition of "materiality," but the court then proceeded to modify that definition. Citing

broad dictionary definitions of "tendency," "capable," and "influence," the court adopted an abstract standard that is not tied to the actual context of the representations or what the decisionmakers were seeking to accomplish:

> Thus, the "natural tendency to influence or capable of influencing" test requires only that the false or fraudulent statements either (1) make the government prone to a particular impression, thereby producing some sort of effect, or (2) have the ability to effect [sic] the government's actions, even if this is a result of indirect or intangible actions on the part of the Defendants. All that is required under this test of materiality, therefore, is that the false or fraudulent statements have the potential to influence the government's decisions.

App. at 21-22. Making the government "prone to a particular impression" and producing "some sort of effect" is not the standard applied by any of the members of this Court in *Kungys*. Likewise, "indirect or intangible actions" that "have the ability to affect the government's actions" would not be material under any of the opinions in *Kungys*. The Fifth Circuit's abstract standard is thus contrary to *Kungys* and to the opinions of the other Circuits that have adopted the conventional standard.

The Fifth Circuit's abstract standard is particularly troublesome because, in this case, the evidence is overwhelming that the alleged false statements

were not material to the actual decisionmakers. For example, the Fifth Circuit hypothesizes that the alleged false statements had the potential to influence BMDO because "Lithium Power painted a picture of an established company" when it fact it "was in its preliminary stages of development that had yet to demonstrate any proven success." App. at 26. The Fifth Circuit did not consider evidence from the actual BMDO decisionmaker, Jeff Bond. For example, Mr. Bond explained that the business history of Lithium Power was not one of the selection criteria:

> **Whether a company is incorporated or not, and how long a company has been in business, were not evaluation criteria.** Even if they were brought up during the formal evaluation and Panel Review process, they would not have been germane to the Phase I evaluation process. Potential companies proposing for an SBIR award did not have to be an incorporated entity until "contract award." **Further, how long a company was in business was not relevant to any facet of the decision making process during the Panel Reviews. These two matters therefore had nothing to do with my decision, as Source Selection Authority, to fund a proposal by Lithium Power or any other company.**

R. 2163-64 (emphasis added).[3] Mr. Bond testified that, if a technical reviewer had raised concerns about the ability of Lithium Power to complete the work, he would have "tabled" those concerns as irrelevant. R. 2401-02. If these sorts of facts are not relevant to the selection process and would not have sparked an investigation, they cannot possibly be material under any of the opinions in *Kungys*.

Similarly, the government argues that Lithium Power fraudulently induced Air Force personnel to grant the Air Force contracts by failing to disclose the existing BMDO contracts in the body of the Air Force contract proposals. However, Lithium Power presented evidence that it had, in fact, separately disclosed the BMDO work to the Air Force and to the final Air Force decisionmaker, David Ryan. R. 2115, 2912. In fact, the BMDO work was listed in an attachment to the Air Force Phase II proposal. R. 1805. Given that Dr. Ryan awarded the Air Force contracts with actual knowledge of the BMDO contracts, he obviously did not consider those contracts to be relevant to the award of the contract, and in fact he did not commence an investigation. Lithium Power's failure to include a reference to the BMDO contracts in the

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[3] The Fifth Circuit noted that one of the technical reviewers claimed to be influenced by the representations in question. App. at 26-27. Materiality must be judged with reference to the decisionmaking body, not with reference to a subordinate technical reviewer. A technical reviewer is not the decisionmaking body. In any event, Mr. Bond made it clear that he would have "tabled" any such concerns if they had been raised. R. 2401-02.

body of the proposals could not possibly have been material to his decisionmaking process.

The Fifth Circuit evaded those issues by applying an abstract standard that considered whether the alleged false statements could possibly have influenced a hypothetical decisionmaker. That standard ignores the realities of the evaluation process and the objectives that the agencies were trying to achieve. In fact, the Fifth Circuit's standard virtually nullifies the materiality requirement, because the government or a *qui tam* plaintiff can always think of some theoretical way in which a minor misrepresentation could possibly affect the evaluation of a contract proposal.

The opinions in *Kungys* illustrate the error of the Fifth Circuit's approach. Under Justice Scalia's opinion, the statements concerning Lithium Power's business history would not be material because they were not relevant to the award of the contracts and because disclosure of the truth would not "predictably have disclosed" any disqualifying facts. In fact, there is no evidence that there were any disqualifying facts in the first place. Under Justice Steven's opinion, the statements would not be material because they did not conceal a disqualifying fact or hinder the discovery of a disqualifying fact. Under Justice White's opinion, the statements would not be material because discovery of their falsity would not have led to an investigation. These were facts that had no real world relevance to the decisionmaking process.

The Court should grant the petition to resolve the conflict between the Fifth Circuit's formulation of the materiality standard and the conventional standard applied by this Court and by the other Circuits. The Court should settle the proper application of the materiality requirement by rejecting the Fifth Circuit's abstract formulation and applying the practical, context-specific standard from *Kungys*. Materiality should be assessed based on the realities of the administrative process, not on speculation and surmise. Under the proper standard, the judgment against Lithium Power should be reversed.

B. The Fifth Circuit Inferred Scienter as a Matter of Law from the Mere Existence of Alleged False Statements, Which Deprived Lithium Power of the Right to a Jury Trial on a Contested Issue of Fact.

In affirming the district court's finding that Lithium Power acted with the requisite scienter for purposes of the FCA, the Fifth Circuit inferred scienter from the mere existence of the alleged false statements. Furthermore, the Fifth Circuit found scienter as a matter of law, despite the existence of controverting summary judgment evidence. The proper legal standard for assessing scienter under the FCA is an important question of federal law that has not been, but should be, settled by this Court.

The scienter standard in the FCA is found in the statutory definition of "knowing" and "knowingly":

> Knowing and Knowingly Defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,
>
> and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b) (amended 2009); App. at 144.[4] It is, of course, well settled that contested issues of intent and scienter present questions of fact for the jury, rather than questions of law for the courts. *See Crawford-El v. Britton*, 523 U.S. 574, 589 (1998).

In this case, the government presented no summary judgment evidence to support a finding of scienter. Instead, the government simply identified various alleged false statements and asserted that Lithium Power, at a minimum, acted with reckless disregard for the truth.

In response, Lithium Power presented evidence to rebut the existence of scienter. For example, one of

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[4] The May 2009 amendments to the FCA changed the format, but not the substance, of the definition. 31 U.S.C. § 3729(b)(1).

the government's allegations is that Lithium Power failed to disclose the existence of the BMDO contracts in the "related work" section of the Air Force proposals. Lithium Power presented testimony from Dr. Munshi that he did not interpret the instructions for the Air Force program to require disclosure of prior contracts and that he believed he was in compliance with the disclosure requirements. R. 2120. Lithium Power also presented testimony from an expert witness who confirmed Dr. Munshi's interpretation of the instructions. R. 2171-72. Finally, Lithium Power presented evidence that it actually disclosed the BMDO contracts to the Air Force, including disclosures to the actual Air Force decisionmaker. R. 2115, 2912. Lithium Power was not concealing anything. All of those facts support the conclusion that Lithium Power did not act with the requisite scienter.

Rather than addressing the issue of scienter on an evidentiary basis, the Fifth Circuit engaged in an unprecedented analysis by inferring scienter from the mere existence of the alleged false statements and omissions. For example, in connection with the Air Force proposals, the Fifth Circuit held that the existence of the omission established "that the Defendants had no intention to perform according to the terms of the SBIR." App. at 26. The Fifth Circuit cited no actual evidence of such intent, because the government had offered none. The Fifth Circuit thus found scienter as a matter of law based on an inference,

even though Lithium Power presented evidence sufficient to rebut the existence of scienter.

Similarly, Lithium Power stated in the proposals that it had "cooperative arrangements" for the use of laboratories and equipment at the University of Houston and Polyhedron Laboratories. The government claims that this statement is false because Lithium Power's arrangement to use those facilities and equipment was on a "fee" basis. Lithium Power presented evidence from Dr. Munshi showing that Dr. Munshi believed that his relationships with the University of Houston and Polyhedron Laboratories were "cooperative arrangements." R. 2116-17. Jeff Bond, the actual decisionmaker at BMDO, indicated that "cooperative arrangements" was an acceptable term that could apply to fee-based arrangements. R. 3351. At a minimum, that evidence raises a question of fact for the jury on the existence of scienter.

Once again, however, the Fifth Circuit simply inferred scienter from the alleged false statement and disregarded the actual evidence of intent:

> The Defendants either purposefully, or with reckless disregard to the truth or the falsity of their statements, misled the BMDO and the Air Force into believing that Lithium Power had a formal partnership with these two organizations. The ability of any member of the public to essentially "rent" the facility is not synonymous with a cooperative arrangement of the type the Defendants hoped the government would infer by their

> statements. These misrepresentations alone would be sufficient to establish that the Defendants had no intention to perform according to the terms of the SBIR. . . .

App. at 24. There was no actual evidence that Lithium Power "hoped" that the government would draw a false conclusion from the term "cooperative arrangement," nor is there any evidence that Lithium Power lacked an intention to perform under the terms of the SBIR. The Fifth Circuit simply inferred those facts from the existence of the alleged false statements.

These are not questions of law to be decided by a court. On the contrary, Lithium Power has the constitutional right to a jury trial on contested issues of fact. Instead, the Fifth Circuit decided the issue as a matter of law based on inferences that were rebutted by summary judgment evidence. This not only violated the summary judgment rules, Fed. R. Civ. P. 56(c)(2), but it deprived Lithium Power of its right to a jury trial.

Furthermore, by inferring scienter from the mere existence of an alleged false statement, the Fifth Circuit effectively negated the scienter element of an FCA claim. In any case in which an FCA defendant makes a false statement, a court can infer that the defendant must not have intended to perform in accordance with the contract, or a court can infer that the defendant was trying to give the federal agency a false impression. The FCA places the burden of proof

on the government with respect to all elements of its claim. 31 U.S.C. § 3731(d). Under the Fifth Circuit's analysis, the government is relieved of the duty to prove an essential element of its case.

The Court should grant the petition to settle this important question of federal law. The Court should reject the Fifth Circuit's inference-based approach and should instead require actual evidence of the requisite scienter. When there is conflicting evidence, scienter should always be a question for the jury, and not the court. Under the proper approach to assessing scienter, the judgment against Lithium Power should be reversed.

C. The Fifth Circuit Approved an Unprecedented Damages Model Based on Complete Disgorgement of All Payments Made to Lithium Power, Which Is Contrary to a Prior Decision of the Fourth Circuit and Which Grants the Government a Windfall Recovery That Greatly Exceeds Any Actual Damages or Loss.

In affirming the district court's imposition of damages based on disgorgement of all sums paid by the agencies to Lithium Power, the Fifth Circuit has decided an important federal issue on a basis that conflicts with a prior decision of the Fourth Circuit. Furthermore, the existence and application of a disgorgement remedy under the FCA is an important question of federal law that has not been, but should be, settled by this Court.

The FCA requires the government to prove damages by a preponderance of the evidence. 31 U.S.C. § 3731(d). In a typical FCA case, these damages relate to overcharges, deficient work, nonconforming products or supplies, and similar issues that lead to tangible damages to the government. If the government cannot prove damages, the government can still recover a civil penalty against the defendant. 31 U.S.C. § 3729(a)(1).

The government has never attempted to prove that it suffered actual damages. In fact, it could not possibly prove actual damages because (1) Lithium Power completed all of the contracts within budget and with accolades from the reviewers, and (2) the agencies received all of the research that they bargained for in the contracts. Under those circumstances, the correct statutory remedy for the government is the civil penalty. *See United States ex rel. Main v. Oakland City University,* 426 F.3d 914, 917 (7th Cir. 2005) ("The statute provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify. . . ." (emphasis in original)).

Nonetheless, the government sought a windfall: disgorgement of all sums paid to Lithium Power by the agencies under a "fraudulent inducement" theory. Specifically, the government identified alleged false statements in the contract proposals submitted by Lithium Power (for example, that Lithium Power listed an incorrect date of incorporation in one of the proposals). The government then argued that the agencies were fraudulently induced to award the

contracts and that the proper measure of damages was disgorgement of every penny that Lithium Power received. The government sought to treble that sum in accordance with the FCA and also to recover the statutory civil penalties. Thus, the government sought a recovery of over $5 million even though it could prove no damages.

This theory, which was accepted by the district court and the Fifth Circuit, is a significant expansion of the FCA. The statute expressly requires the government to prove damages, while providing a civil penalty for the situations in which the government is unable to prove damages. By recognizing a disgorgement remedy, the Fifth Circuit's decision allows damage awards that bear no relation to the injury, if any, suffered by the government. For example, in this case, Lithium Power must pay over $5 million even though its work for the agencies received excellent reviews.

This Court has never recognized a fraudulent inducement theory or disgorgement remedy under the FCA.[5] A few lower courts have recognized a limited

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[5] The government has cited this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), to support a "fraudulent inducement" theory under the FCA. However, the actual issue in *Hess* was different. The defendants in *Hess* had engaged in collusive bidding to obtain contracts from local government units. The local government units paid the contracts using funds from a federal program. The defendants argued that they were not liable under the FCA because they had never "presented" a claim to the federal government, but instead dealt

(Continued on following page)

disgorgement remedy for situations in which the contractor would have been ineligible to receive the contract absent the misrepresentation. *E.g., United States v. Thomas,* 709 F.2d 968, 972-73 (5th Cir. 1983) (requiring farmers who were ineligible for a cotton subsidy program to repay the subsidies in full). Other courts have held that a defendant may be liable for ordinary damages equal to the total of all payments from the government, when the defendant's goods or services were so deficient that they provided no value to the government. *E.g., United States v. TDC Management Corp.,* 288 F.3d 421, 428 (D.C. Cir. 2002) (because a contractor hired to be an impartial ombudsman had a conflict of interest, the contractor's services had no value to the government); *United States ex rel. Compton v. Midwest Specialties, Inc.,* 142 F.3d 296, 304 (6th Cir. 1998) (assessing full damages when the contractor delivered valueless brake shoes).

By contrast, the Fourth Circuit rejected the application of a disgorgement theory when the defendant gave the government what it paid for:

> Harrison first argues that the district court erred by ruling that he could not seek disgorgement of all monies paid by DOE to

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solely with the local government units. The Court rejected that argument because the collusive bids caused the federal government to advance money to the local government units. *Id.* at 542-45. The Court did not address the existence of a disgorgement remedy under a fraudulent inducement theory.

Westinghouse as damages. He claims that the subcontract was void ab initio because of the fraud perpetrated by Westinghouse and, therefore, the $ 9 million that DOE ultimately paid for the work GPC performed under the subcontract should be disgorged.

The district court ruled that Harrison failed to prove any actual damages suffered by the government because there was no evidence that it cost the government more to have GPC perform the subcontract than any other firm. Harrison does not dispute this finding on appeal.

. . . .

We conclude that, under the particular facts of this case, the district court properly required the plaintiff to prove damages by showing how much more the government paid GPC to perform the subcontract than it would have paid another firm absent the false no-OCI certification. **Although Westinghouse ran afoul of the fair bidding requirements, there was no evidence adduced at trial suggesting that GPC failed to perform the work that it was required to perform under the subcontract or that the government did not receive the benefit of the work performed. Harrison presented no evidence that the government did not get what it paid for or that another firm could have performed the work for less. As such, the district court correctly disallowed**

Harrison from recovering disgorgement of all $ 9 million that the government paid for the subcontracted work.

United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 922-23 (4th Cir. 2003) (emphasis added). This is the correct analysis: an award of damages must be related to the actual loss, if any, suffered by the government. If the contractor performs the work as agreed, there is no basis for disgorgement.

The Fifth Circuit did not claim that its holding was supported by any precedent. Instead, the Fifth Circuit held that the award of disgorgement damages was justified by the peculiar nature of research contracts such as those under the SBIR program. Specifically, the court found that disgorgement was appropriate because the government never receives any tangible benefit under such contracts and because any intangible benefit is impossible to calculate:

> The contracts entered into between the government and the Defendants did not produce a tangible benefit to the BMDO or the Air Force. These were not, for example, standard procurement contracts where the government ordered a specific product or good. The end product did not belong to the BMDO or the Air Force. Instead, the purpose of the SBIR grant program was to enable small businesses to reach Phase III where they could commercially market their products. The Government's benefit of the bargain was to award money to eligible

> deserving small businesses. The BMDO and the Air Force's intangible benefit of providing an "eligible deserving" business with the grants was lost as a result of the Defendants' fraud. Finally, a direct causal relationship existed between the funds received by the Defendants and their false statements.
>
> In a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants.

App. at 29-30. The court thus entirely discounted the relevance of the fact that Lithium Power performed all of its obligations under the contract and delivered exactly what it promised to deliver. The Fifth Circuit's analysis is thus contrary to the Fourth Circuit's decision in *Harrison* and, by the Fifth Circuit's own admission, is unsupported by any precedent.

Furthermore, the Fifth Circuit's analysis proceeds from the false assumption that a "tangible benefit" can only flow from the delivery of a "specific product or good." Lithium Power performed research and development services as required by the terms of its contracts. That was a tangible benefit to the agencies.

Services have value. Regardless of whether the agencies were the primary beneficiaries of the research in question, the agencies contracted with Lithium Power for research. Lithium Power performed the research. Lithium Power bought materials.

Lithium Power paid its employees. Lithium Power generated reports. In the end, Lithium Power provided a final report and sample batteries. All of that was "tangible."

There are many types of government contracts that involve services. For example, the government may contract for consulting services or public relations services. Under the Fifth Circuit's rationale, those contracts would potentially be subject to a disgorgement remedy under the FCA because the government received no tangible benefit and because the intangible benefit is impossible to calculate. The Fifth Circuit's rationale simply makes no sense.

The Fourth Circuit's test in *Harrison* makes much more sense: Did the government get what it paid for? If the answer is yes, then there is no disgorgement remedy. The government can either seek to prove actual damages or simply rely on the civil penalty.

By contrast, the Fifth Circuit's analysis turns the statutory framework on its head. The statute requires the government to prove damages. However, if the government cannot prove damages because the "intangible benefit" of the contractor's services is impossible to calculate, the Fifth Circuit would allow the government to recover everything that it paid to the contractor.

Finally, the Fifth Circuit's analysis makes no sense even in the limited context of SBIR research contracts. By definition, the SBIR programs target

small businesses, many of which are start-up companies. Such companies are more prone to making errors in their proposals than large, established companies. Under the Fifth Circuit's rationale, virtually any error in a research proposal could lead to a claim for disgorgement years later, even though the small research company did everything that it agreed to do, and even though the government accepted and praised the results of the program. The law does not, and should not, support such a result.

There is no special damages rule for research contracts in the FCA. In fact, such a rule would have the ironic result of making small research companies subject to larger damage awards than big companies that perform conventional services for the government. The Fifth Circuit effectively adopted such a rule.

If the agency that awards a research contract suffered some intangible harm due to the fact that it could have awarded the contract to some other company, the correct remedy under the FCA is a civil penalty. There is no need to fashion a draconian remedy for an intangible injury.

The Fifth Circuit's analysis opens the door to enormous judgments against small research companies in *qui tam* suits, and perhaps against other types of service companies. This does not further the purposes of the FCA. The civil penalty provisions of the FCA are sufficient to deter fraud, and a windfall

award of damages to the government is inappropriate when the government has suffered no loss.

The Court should grant this petition to resolve the conflict between the Fourth and Fifth Circuits, and also to settle the proper circumstances under which a disgorgement remedy is appropriate under the FCA. The Court should approve the reasoning of the Fourth Circuit and disallow disgorgement when a contractor has fully performed its contract with the government. The award of damages against Lithium Power should be reversed.

D. The Fifth Circuit's Application of Federal Public Policy and the FCA to Negate a Personal Release and Indemnity by the Relator Conflicts with This Court's Precedent, Conflicts with Decisions of the Ninth Circuit, and Effectuates a Fraud by the Relator.

By invoking federal public policy and the FCA to relieve Longhi from his release and indemnity, the Fifth Circuit has decided an important issue of federal law that conflicts with the decisions of this Court and the Ninth Circuit. Furthermore, the enforceability of a release made after the filing of a *qui tam* lawsuit presents an important issue of federal law that has not been, but should be, settled by this Court.

As a threshold matter, it should be noted that the release and indemnity do not affect any of the claims

by the government. Lithium Power has never claimed that Longhi's release is binding on the government. In fact, the FCA provides that the government is not bound by any act of the *qui tam* relator. 31 U.S.C. § 3730(c)(1) (amended 2009); App. at 147. At this point, the only personal claim by Longhi is his claim for attorneys' fees.

The application of a "public policy" bar to the enforcement of a release must be determined on a case-by-case basis. The seminal case on this topic is *Town of Newton v. Rumery*, 480 U.S. 386 (1987). That case involved a "release-dismissal" agreement, under which the plaintiff agreed to release his civil rights claims against municipal officials in exchange for the dismissal of criminal charges. The First Circuit adopted a "per se" rule that invalidated any such releases because the agreements would tempt prosecutors to trump up charges in order to coerce plaintiffs into releasing their constitutional claims.

This Court rejected the per se rule, noting that, "although we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a per se rule." *Id.* at 392. Instead, the Court adopted the rule that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Id.* The Court ultimately upheld the dismissal-release agreement because it found "that this agreement was voluntary,

that there is no evidence of prosecutorial misconduct, and that enforcement of his agreement would not adversely affect the relevant public interests." *Id.* at 398.

The first element of *Rumery* is that public policy must actually be harmed by enforcement of the release. In this case, it is undisputed that Longhi had met with the government and filed his *qui tam* lawsuit prior to signing the release. The whistle had already been blown. Enforcing the release could not possibly discourage Longhi from coming forward, because he had already come forward.

The case law from the lower courts – in particular the Ninth Circuit – reflects this distinction. When the relator has not yet filed his *qui tam* action at the time of signing the release, the courts have refused to enforce releases because the releases could discourage relators from coming forward with their claims.[6] *E.g.*, *United States ex rel. Green v. Northrup Corp.*, 59 F.3d 953, 965-66 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996). If the relator has already filed his claim at the time of signing the release, on the other hand,

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[6] The Tenth Circuit recently created an exception to this rule in a case in which the company, rather than the relator, had disclosed the fraud to the government. The court held that the release was enforceable because, unlike the situation in *Green* and similar cases, the government had been made aware of the fraud even before the *qui tam* lawsuit was filed. *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168-71 (10th Cir. 2009).

the courts have enforced the releases. *E.g., United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997) ("In this case, the concerns that led us to deny enforcement in *Green* are not present. The federal government was aware of Hall's allegations regarding false certifications. Therefore, the public interest in having information brought forward that the government could not otherwise obtain is not implicated."). Because Longhi had already filed his *qui tam* action, the release does not implicate any valid federal public policy concern.[7]

The second element of *Rumery* is that the public policy must outweigh the interest in the enforcement of the release. In this case, Longhi committed securities fraud. He cheated Mrs. Munshi out of $80,000.00, knowing that Mrs. Munshi would never have bought his stock without the release and indemnification. Ironically, the Fifth Circuit effectively sanctioned criminal conduct in the name of federal

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[7] Although the Fifth Circuit did not address the issue, Longhi previously argued that *Hall* is distinguishable because the relator executed the release in that case after the government had completed its investigation. Longhi thus argued that his release is unenforceable because it was made prior to the conclusion of the government's investigation in this case. Longhi contended that, because the investigation was still ongoing, there was a federal public policy interest in his continued assistance to the government during the investigation. The Tenth Circuit recently rejected that argument, because the limited value of continuing assistance from a relator does not outweigh the public policy interest in enforcing contracts. *Ritchie*, 558 F.3d at 1170-71.

public policy. Under the facts of this case, there is no way that a tenuous public policy argument can outweigh the interests in enforcing a valid contract and protecting Mrs. Munshi from fraud by Longhi.

Nonetheless, the Fifth Circuit departed from the Ninth Circuit's analysis in *Green* and *Hall* by holding that Longhi's release was void under federal public policy. Furthermore, the Fifth Circuit departed from this Court's decision in *Rumery* by adopting a per se rule. Specifically, the Fifth Circuit held that releases by relators would always be unenforceable:

> The public policy interest implicated in this case is the ability of the Government to obtain information from relators it could not otherwise obtain. It is in the Government's best interest to gain full information from the relator. To enforce the release and indemnification clauses contained in the stock sale agreement against Longhi would ignore the public policy objectives expressly spelled out by Congress in the FCA and would provide disincentives to future relators. In addition, enforcing the release and indemnification clauses would encourage individuals guilty of defrauding the United States to insulate themselves from the reach of the FCA by simply forcing potential relators to sign general agreements invoking release and indemnification from future suit.

App. at 33. The Fifth Circuit did not conduct the balancing required by *Rumery*, nor did it perform the

careful analysis of the public policy interests shown by the Ninth Circuit's decisions.

The Fifth Circuit also sought to rely on 31 U.S.C. § 3730(b)(1) (amended 2009); App. at 145, which prohibits a relator from dismissing an FCA lawsuit without the permission of the government. The statute applies only to voluntary dismissals by the relator, as opposed to involuntary dismissals. *Minotti v. Lensink*, 895 F.2d 100, 103-04 (2d Cir. 1990) ("[W]e find that [the statute] applies only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal."). Given that Longhi never sought to voluntarily dismiss his claims, the statute is inapplicable to this case. Nothing in section 3730(b)(1) has any application to a release.

It is important to remember that the government was never bound by Longhi's release. 31 U.S.C. § 3730(c)(1) (amended 2009); App. at 147. Even after the execution of the release, the government was entitled to intervene in the *qui tam* lawsuit and to pursue all of the claims that Longhi identified. The only person bound by the release was Longhi. If the government had decided not to intervene, his claims would have been subject to involuntary dismissal because of the release. Section 3730(b)(1) would protect the government from a premature dismissal of the case, but it would not save Longhi from an involuntary dismissal based on his own personal release. Section 3730(b)(1) simply has no application to the release.

The Court should grant this petition to resolve the conflict between the Fifth and Ninth Circuits, to resolve the conflict between the Fifth Circuit's holding and the holding in *Rumery*, and also to settle the proper circumstances under which a personal release by a relator is unenforceable as a matter of federal public policy. The Court should approve the reasoning of the Ninth Circuit and hold that a release is enforceable if executed after the relator's allegations have been disclosed to the government. The award of attorneys' fees to Longhi, and the dismissal of Lithium Power's indemnification claim against Longhi, should be reversed.

CONCLUSION

For the reasons set forth above, the Court should grant this petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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REVISED July 15, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20194
No. 08-20306

United States of America, ex rel;
ALFRED J. LONGHI, JR

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA

Intervenor-Appellee

v.

LITHIUM POWER TECHNOLOGIES INC;
MOHAMMED ZAFAR A MUNSHI

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jul. 9, 2009)

Before HIGGINBOTHAM, BENAVIDES and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

In 2002, Alfred J. Longhi, Jr. ("Longhi"), a former employee of Lithium Power Technologies, Inc. ("Lithium Power"), filed a *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729, against Lithium Power and its president, Mohammed Zafar A. Munshi (jointly, "the Defendants"). In 2005, the United States of America intervened in the suit. Longhi and the United States of America (jointly, "the Government") alleged that the Defendants engaged in an elaborate pattern of false statements to secure research grants from the federal government. Ultimately, the district court granted the Government's motions for summary judgment on liability and damages. The court awarded nearly $5 million in damages and penalties, and the parties voluntarily dismissed the remaining claims in the lawsuit. The Defendants moved for reconsideration, and the district court denied that motion and entered a final judgment. Longhi then filed a motion for statutory attorneys' fees, which the district court granted in full. The Defendants now appeal the district court's finding of liability, award of damages, and award of attorneys' fees to Longhi. We AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1982, Congress established the Small Business Innovation Research ("SBIR") program. The goal of the SBIR program is to provide research assistance to small businesses in order to maintain and strengthen the competitive free enterprise system

and the national economy. *See* 15 U.S.C. § 638(a). Congress directed each federal agency with a research and development budget exceeding $100 million to establish a SBIR program and to provide some fraction of its budget to small businesses. 15 U.S.C. § 638(f). Each federal agency with a SBIR program was charged with selecting awardees for its SBIR funding. 15 U.S.C. § 638(g).

The Department of Defense ("DoD") administers a SBIR program in which twelve military components participate. The DoD identifies specific research projects that it is interested in funding and allows small businesses to seek SBIR grants for these projects. DoD's program solicitations explicitly state that knowingly and willfully making any false, fictitious, or fraudulent statements or representations may be a felony under the Federal Criminal False Statements Act, 18 U.S.C. § 1001. After receiving proposals, the DoD selects those that they perceive offer the best value to the government and nation. The merits of a SBIR proposal are in part measured by an examination of the applicant's qualifications. The DoD specifically considers the: (1) key personnel available to perform the research, (2) facilities and equipment available to the applicant, and (3) scope of any previously funded work performed by the applicant that may be similar to that proposed. When the DoD selects a proposal for funding, the agency enters into a contract with the recipient that governs the terms under which the funds are disbursed. The DoD generally does not verify all of the information

submitted in a proposal, and it depends heavily on the integrity of SBIR applicants.

Under the DoD's SBIR program, there are two types of SBIR grants. A Phase I research grant is intended for the recipient to determine the scientific, technical, and commercial merit and feasibility of ideas submitted under the SBIR program. These grants typically range from $60,000 to $100,000 and cover at most a nine-month period. If the DoD determines that the Phase I grant recipient demonstrates that future research may potentially yield a product or process of continuing importance to the DoD and the private sector, it can award a Phase II grant. Phase II grants are only available to applicants who previously received a Phase I award and are aimed at research or a research and development effort. A Phase II grant is expected to produce a well-defined, deliverable prototype and typically ranges from $500,000 to $750,000 over a two-year period. During Phase III of a research and development project, the applicant is expected to obtain funding from the private sector or non-SBIR government sources to develop the prototype into a viable product.

In 1998, Munshi founded a small business, Lithium Power. Lithium Power designs and manufactures specialized lithium-based batteries for commercial and government applications. Munshi is Lithium Power's majority shareholder, president, chief executive officer, and chairman of the board.

The Defendants submitted four proposals – two to the Ballistic Missile Defense Office ("BMDO") and two to the Air Force – to receive Phase I and II SBIR grants for research that could lead to the development of very thin rechargeable batteries. In connection with the four SBIR grants, the Defendants submitted more than fifty invoices to the BMDO and the Air Force for payment and received more than $1.6 million.

Lithium Power's four SBIR proposals contained the false claims at issue in this case. In 2000, the relator[1] in this action, Longhi, joined Lithium Power as Vice President for Sales and Marketing. During 2001 and 2002, Longhi began to suspect that the Defendants were defrauding the federal government. He began documenting what he believed was the Defendants' pattern of fraudulent conduct and investigating a means to stop the fraud. In August 2002, Longhi began working with counsel to prepare his FCA case, and he met with the Government on September 20, 2002. One month later, Munshi told Longhi that "due to tough economic times" Longhi would be placed on a three-day work week beginning November 2, 2002, and receive a 40 percent decrease in compensation. Longhi informed Munshi that he

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[1] Suits to collect statutory damages and civil penalties under the FCA may be brought by the Attorney General or by a private person, known as a relator, in the name of the United States. An action brought by a relator is commonly referred to as a *qui tam* action. *See* 31 U.S.C. § 3730(a) and (b)(1).

could not afford the extreme decrease in pay and needed to sell his Lithium Power stock to raise capital. On November 4, 2002, Munshi told Longhi that he would be laid off within two weeks and offered to buy Longhi's stock for between $80,000 and $90,000. On November 6, 2002, Munshi explained that the stock sale would be the subject of a more detailed agreement.

On November 18, 2002, Longhi filed a *qui tam* action against the Defendants to recover statutory damages and civil penalties under the FCA. On November 21, 2002, Munshi provided Longhi with a copy of the stock sale agreement. On November 25, 2002, Munshi laid off Longhi. The agreement for the sale of stock contained a provision stating that Longhi personally agreed to release the Defendants from pending claims or lawsuits and agreed not to sue the Defendants for the loss of Longhi's job. The original covenant also disallowed Longhi to sue "for any other reason," but Longhi objected to this language and it was changed to "for any other matter prior to execution of" the agreement to sell the stock. The agreement was executed by the parties on November 29, 2002, eleven days after Longhi filed suit against the Defendants. Munshi's wife paid Longhi $80,000 for the stock.

Longhi's *qui tam* action accused Lithium Power of double billing and of billing for work that was never completed in connection with twenty-one different contracts. The United States investigated and intervened in 2005 in connection with Longhi's

allegations pertaining to fraudulent billing on the four SBIR grant proposals. The Defendants denied Longhi's allegations, and the Government failed to uncover evidence that supported Longhi's allegations.

On November 9, 2006, the Government filed a motion for partial summary judgment as to liability and argued that the undisputed record evidence demonstrated that the Defendants had, at a minimum, shown a reckless disregard for the truth regarding many of the representations in their four SBIR grant proposals. On December 22, 2006, the Defendants filed a cross-motion for partial summary judgment. The district court granted the Government's motion for partial summary judgment on March 23, 2007. The district court stated that fraudulently inducing the Government to provide funding for a project could give rise to FCA liability, even if the statements on particular invoices submitted in connection with the project were true. The district court explained that the Government needed only to demonstrate that the Defendants either were willfully blind to the falsity of the statements or acted with an extreme form of negligence in making those statements.

In determining the merits, the district court examined five separate categories of statements in the Defendants' SBIR proposals. First, the district court explained that the Defendants' BMDO Phase II proposal falsely stated that Lithium Power was incorporated in 1992. Second, the district court concluded that the Defendants misrepresented the

key personnel who would be conducting the research work in three of the four proposals. The district court noted, however, that the misrepresentations as to key personnel resulted from mere negligence, and the court discounted this evidence. Third, the district court determined that Lithium Power knowingly falsified statements regarding its facilities and equipment. Fourth, the district court concluded that the Defendants acted with reckless disregard to the falsity of statements by representing that Lithium Power had cooperative arrangements with the University of Houston and Polyhedron Laboratories. Fifth, the district court noted that the Defendants failed to disclose in its Air Force SBIR grant proposals that Lithium Power had previously undertaken related work in connection with a BMDO SBIR grant.

The district court then assessed whether these false statements, omissions, and misrepresentations were "material." The district court explained that under the FCA materiality requires that the false statement in question have a natural tendency to influence or be capable of influencing a decision-maker. The district court concluded that the Government offered ample summary judgment evidence that the misrepresentations were actually material.

The Government then moved for summary judgment on damages. The district court held that the Government suffered damages in the amount of the grants it paid out to the Defendants in connection with their deceptive proposals – $1,657,455. The

court tripled that amount, as required by the FCA, and awarded $4,972,365 in damages. The district court rejected the Defendants' contention that the damages should be reduced to reflect the benefit the United States received from the battery research that Lithium Power performed.

The parties stipulated to a voluntary dismissal of the Government's remaining claims and the Defendants' counterclaims without prejudice. Longhi's claims regarding the other seventeen contracts, that the Government did not intervene in, were among those dismissed. The district court entered final judgment for the Government based on that stipulation. The Defendants appeal the district court's finding of liability and damages award.[2]

On February 5, 2008, Longhi filed a motion for statutory attorneys' fees and final judgment. On February 25, 2008, the Defendants objected to Longhi's motion on a variety of grounds. Specifically, the Defendants stated that Longhi's motion for attorneys' fees failed to segregate the hours worked by his attorney on contracts and claims for which Longhi was not the prevailing party (i.e., the seventeen claims that were dismissed). The district court did not require Longhi to segregate the time his attorneys worked, and awarded Longhi the full

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[2] The Defendants' appeal regarding the district court's finding of liability and damages award is found in case No. 08-20194.

amount of fees and costs that he requested – $283,765. The Defendants now also appeal the district court's award of attorneys' fees.[3]

II. LIABILITY & DAMAGES AWARD

In appealing the district court's judgment finding the Defendants liable and awarding damages to the Government, the Defendants make four arguments. First, they allege that the district court erred in granting the Government's motion for partial summary judgment on the merits and finding that the Defendants violated the FCA. Second, the Defendants argue that the district court erred in granting the Government's motion for summary judgment with respect to damages and finding that the United States was entitled to recover the full amount of the grant awards paid out to the Defendants and to receive treble damages. Third, the Defendants allege that the district court erred in determining that their claims for release and indemnification from Longhi were against public policy and the text of the FCA. Finally, the Defendants contend that the district court erred by denying their summary judgment motions with respect to liability, damages, and the enforceability of the release and indemnification agreement. We discuss each of the Defendants' arguments in turn.

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[3] The Defendants' appeal regarding the district court's award of attorneys' fees is found in case No. 08-20306.

A. Standard of Review

This Court reviews summary judgment orders *de novo,* applying the same standards as the district court. *Langhoff Props., LLC v. BP Prods. N. Am. Inc.*, 519 F.3d 256, 260 (5th Cir. 2008). Summary judgment is proper when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). This Court resolves any doubts and draws all reasonable inferences in favor of the nonmoving party. *Langhoff Props.*, 519 F.3d at 260.

B. Violation of the False Claims Act

The district court granted the Government's motion for partial summary judgment on the merits and found that the Defendants violated the FCA. The Defendants argue that the district court erred because: (1) with regards to the BMDO Phase I grant, the misstatement of Lithium Power's date of incorporation does not give rise to liability under the FCA because it was an error that resulted from inadvertence or mere negligence and was not material; (2) with regards to the BMDO Phase I grant, statements regarding Lithium Power's facilities did not give rise to liability under the FCA, because the facilities were under construction when the Defendants made the statements and were completed by the time the government funded the proposal; (3) with regards to

all four grant applications, the Defendants' statements concerning "cooperative arrangements," as opposed to "cooperative research arrangements," with the University of Houston and with Polyhedron were true and did not give rise to liability under the FCA, because they had a cooperative arrangement to use laboratories and scientific equipment, different than a cooperative research agreement to conduct certain research for a defined time period, and the statement was not material; (4) with regards to the BMDO Phase I and II grants and the Air Force Phase II grant, that statements regarding specific personnel indicated an expectation and wish to hire those individuals, but did not put forth that the individuals would necessarily accept an offer of employment; and (5) with regards to the Air Force Phase I and II grants, the Defendants assert that they properly disclosed the BMDO contracts to the Air Force when submitting their proposals, because they informed individual Air Force personnel of the BMDO SBIR grants. Thus, the Defendants request that we reverse and remand the district court's grant of the Government's motion for summary judgment.

The Government contends that the district court properly granted summary judgment in its favor after correctly concluding that the Defendants' false statements affected the SBIR grant selection process. The Government argues that the Defendants violated the FCA by submitting four SBIR proposals replete with false statements that gave the DoD the mistaken impression that Lithium Power was far more

qualified than it actually was to engage in the proposed research. The Government argues that taken individually, "any *one* of the falsehoods would suffice to demonstrate a violation of" the FCA. At a minimum, the Government argues that the Defendants acted with a reckless disregard for the truth and presented false claims to the DoD, allowing Lithium Power to secure more than $1.6 million in research grants. The Government notes that the Defendants maintain that several of its misrepresentations were made inadvertently. In response, the Government argues that while subjective inadvertence is relevant to whether the Defendants had actual knowledge of the falsity of their statements, it is not relevant to the objective inquiry into whether the Defendants acted with reckless disregard of a statement's truth or falsity. The Government also argues that the Defendants' repeated false statements were material to the selection process. The Government explains that because an applicant's qualifications are a critical feature of the SBIR evaluation process, the Defendants' falsehoods had a natural tendency to influence and were capable of influencing the extremely competitive process for selecting small businesses to receive SBIR grants. The Government maintains that each false statement contributed to the impression that Lithium Power was better suited to carry out the proposed research than it actually was.

1. Legal Standard for Finding a Violation of the False Claims Act

An individual violates the FCA when he

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C. § 3729(a). We note that while the underlying fraud that invokes the FCA differs under § 3729(a), "the statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the claim for payment." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (quoting *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995)) (internal quotation marks omitted).

The FCA defines the terms "knowing" and "knowingly," which mean that a person, with respect to information –

> (1) has actual knowledge of the information;

> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b). In addition to the requirements found in the text, our jurisprudence holds that a false or fraudulent claim or statement violates the FCA only if it is material. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (stating that the FCA "interdicts material misrepresentations made to qualify for government privileges or services") (citation and quotation marks omitted); *see also Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126 (2008)[4] (explaining that "a plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim").

We have consistently recognized the requirements discussed above, but we have not yet delineated a succinct test recognizing each element. The Fourth Circuit has concisely stated these various requirements in one test, which we adopt today:

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[4] The Defendants argue that *Allison Engine Co.* is inapplicable to the instant case because false statements were made to a government contractor and not directly to the United States. We see no reason why the FCA would require a materiality standard in cases involving government contractors and not the United States.

(1) whether "there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim)." *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (quoting *Harrison*, 176 F.3d at 788) (internal quotation marks omitted); *see also United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1177-78 (9th Cir. 2006); *Cf. United States ex. rel. Mikes v. Straus*, 274 F.3d 687, 695 (2d Cir. 2001) (utilizing a five-part test where a violation of the FCA is shown when an individual (1) makes a claim, (2) to the United States government, (3) that is false or fraudulent, (4) knowing its falsity, and (5) seeking payment from the federal treasury).

a. False or Fraudulent Statement

In the instant appeal, the Government alleges that the Defendants engaged in a fraudulent course of conduct by submitting false statements in the SBIR grant proposals. The Government does not allege that the Defendants submitted false claims for payment for each SBIR grant proposal. In certain cases, FCA liability may be imposed "when the contract under which payment is made was procured by fraud." *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 384 (5th Cir. 2003) (citing *Harrison*, 176 F.3d at 787). This type of FCA claim is characterized as fraudulent inducement.

Under a fraudulent inducement theory, although the Defendants' "subsequent claims for payment made under the contract were not literally false, [because] they derived from the original fraudulent misrepresentation, they, too, became actionable false claims." *United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007) (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-44 (1943)).[5]

b. Requisite Scienter

The Government contends that the Defendants' fraudulent conduct was "made or carried out with the requisite scienter." The scienter requirement comes from § 3729(b)'s definition of the terms "knowing" and "knowingly." We have explained that "[t]hough the FCA is plain that 'proof of specific intent to defraud' is not necessary, [the mens rea] requirement is not met by mere negligence or even gross negligence." *United States ex rel. Farmer v. City of*

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[5] We note that *Laird* outlines a two part test "to succeed on a fraud-in-the-inducement theory under the FCA." *Laird*, 491 F.3d at 259. Under the *Laird* test the Government must prove that the Defendants (1) had no intention to perform according to the terms of the SBIR, and (2) obtained payments under the SBIR contract that it was not legitimately entitled. *See id.* (citations omitted). The second portion of this statement could be construed as requiring "outcome materiality," which is discussed in detail below. *Laird*, however, expressly declines to rule on the proper standard for assessing materiality. *Id.* at 261 (citation omitted).

Houston, 523 F.3d 333, 338 (5th Cir. 2008) (internal citation omitted). Thus, the Government must demonstrate the Defendants had (1) actual knowledge of falsity, (2) acted with deliberate ignorance of the truth or falsity of the information provided, or (3) acted with reckless disregard of the truth or falsity of the information provided when the Defendants fraudulently induced the BMDO and Air Force to award them the SBIR grants. *See id.* at 339.

c. Materiality

The Government next argues that the false statements in the SBIR grant proposals were material. "No majority decision of this circuit has addressed the proper standard for assessing the materiality of a false statement under the FCA's civil-liability provisions." *Laird,* 491 F.3d at 261. The parties and this Court all recognize that "a false statement is material if it has a 'natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Neder v. United States,* 527 U.S. 1, 16 (1999) (quotation omitted) (insertion in original); *see also United States v. Southland Mgmt. Corp. (Southland II),* 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring); *United States v. Southland Mgmt. Corp. (Southland I),* 288 F.3d 665, 676 (5th Cir. 2002), *vacated by grant of reh'g en banc,* 307 F.3d 352 (5th Cir. 2002) (quoting *United States v. Wells,* 519 U.S. 482, 489 (1997)).

In *Southland I*, however, we noted two different interpretations of the "natural tendency to influence or capable of influencing" standard. *Southland I*, 288 F.3d at 676. Some courts have defined the standard to require "outcome materiality" – "a falsehood or misrepresentations must affect the government's ultimate decision whether to remit funds to the claimant in order to be 'material.'" *Id.* (citing *United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1459-60 (4th Cir. 1997); *United States v. Intervest Corp.*, 67 F. Supp. 2d 637, 646-48 (S.D. Miss. 1999)). In contrast, another court required what is termed "claim materiality" – "a falsehood or misrepresentation must be material to the defendant's claim of right in order to be considered 'material' for the purposes of the FCA." *Id.* (citing *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 630 (S.D. Tex. 2001)). In *Southland II*, five judges of this Court suggested that outcome materiality is the correct standard, explaining that a statement is material only if it actually affects the government's decision to pay. *See Laird*, 491 F.3d at 261 (citing *Southland II*, 326 F.3d 669 at 679 n.3).[6]

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[6] Judge Jones's concurrence first explained that the accepted definition of materiality for civil FCA claims "equates materiality with 'having a natural tendency to influence, or [being] capable of influencing, the decision of the decision-making body to which it was addressed.'" *Southland II*, 326 F.3d at 679 (quotation omitted) (insertion in original). However, read it is entirety the concurrence implicitly adopts and applies the outcome materiality standard.

The Government, however, contends that these definitions are incorrect. It argues that the FCA requires proof only that the defendant's false statements "could have" influenced the government's payment decision or had the "potential" to influence the government's decision, not that the false statements actually did so. We agree. The outcome and claim materiality definitions unnecessarily narrow the "natural tendency to influence or capable of influencing" test, which is unambiguous and easily applied.[7]

The lack of ambiguity in this test is clear when we examine the common meaning of the words used. The *Oxford English Dictionary* ("OED") defines tendency as "a constant disposition to move or act in some direction or toward some point, end, or purpose; leaning, inclination, bias, or bent toward some object, effect, or result." *Oxford English Dictionary* Online, www.oed.com (last visited June 15, 2009) (defining "tendency"). The *Merriam-Webster Dictionary* (*"Merriam-Webster"*) defines tendency as "a proneness to a particular kind of thought or action." *Merriam-Webster Dictionary* Online, www.merriam-webster.com

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[7] Adopting this test for materiality under the FCA aligns with our test for materiality under 18 U.S.C. § 1001, the Federal Criminal False Statements Act. Our decisions state the test for materiality under § 1001 as "'tendency' or 'capacity to influence.'" *See generally United States v. McIntosh*, 655 F.2d 80, 83 (5th Cir. 1981) (citing *United States v. Krause*, 507 F.2d 113, 118 (5th Cir. 1975); *United States v. McGough*, 510 F.2d 598, 602 (5th Cir. 1975)).

(last visited June 15, 2009) (defining "tendency"). The OED has two definitions of "capable" that apply in this context: "able or fit to receive and be affected by; open to, susceptible" and "able to be affected by; of a nature, or in a condition, to allow or admit of; admitting; susceptible." *Oxford English Dictionary* Online, www.oed.com (last visited June 15, 2009) (defining "capable"). *Merriam-Webster* defines capable as "susceptible <a remark *capable* of being misunderstood>." *Merriam-Webster Dictionary* Online, www.merriam-webster. com (last visited June 15, 2009) (defining "capable"). Finally, OED defines influence as "ascendancy, sway, control, or authority, not formally or overtly expressed" and as "[a] thing (or person) that exercises action or power of a non-material or unexpressed kind." *Oxford English Dictionary* Online, www.oed.com (last visited June 15, 2009) (defining "influence"). *Merriam-Webster* defines influence as "the act or power of producing an effect without apparent exertion of force or direct exercise of command," "corrupt interference with authority for personal gain," and "the power or capacity of causing an effect in indirect or intangible ways." *Merriam-Webster Dictionary* Online, www.merriam-webster.com (last visited June 15, 2009) (defining "influence").

Thus, the "natural tendency to influence or capable of influencing" test requires only that the false or fraudulent statements either (1) make the government prone to a particular impression, thereby producing some sort of effect, or (2) have the ability to effect the government's actions, even if this is a result

of indirect or intangible actions on the part of the Defendants. All that is required under the test for materiality, therefore, is that the false or fraudulent statements have the potential to influence the government's decisions.

Our conclusion is buttressed by cases from our sister circuits. The Ninth Circuit recently recognized a circuit split to measure materiality under the FCA. *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008). The court noted that the Fourth and Sixth Circuits have adopted a "'natural tendency test' for materiality, which focuses on the potential effect of the false statement when it is made rather than on the false statement's actual effect after it is discovered." *Id.* (quoting *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 445 (6th Cir. 2005)); *see also United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913, 916-17 (4th Cir. 2003). The court then explained that the Eighth Circuit has adopted the "more restrictive 'outcome materiality test.'" *Bourseau*, 531 F.3d at 1171 (citing *Costner v. URS Consultants*, 153 F.3d 667, 677 (8th Cir. 1998)). The Ninth Circuit adopted the Fourth and Sixth Circuits natural tendency test "for materiality because it is more consistent with the plain meaning of the FCA." *Id.* (citation omitted).

Moreover, Congress recently codified the definition of materiality when it enacted the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4, 123 Stat. 1617 (2009) (to be

codified at 31 U.S.C. § 3729). Congress enacted § 4 of FERA to clarify the FCA and "to reflect the original intent of the law." *Id.* Congress's enactment will add the following language to § 3729(b): "(4) the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." If Congress intended materiality to be defined under the more narrow outcome materiality standard, it had ample opportunity to adopt the outcome materiality standard in FERA. Instead, Congress embraced the test as stated by the Supreme Court and several courts of appeals. While we decline to rule on whether this statute applies retroactively or prospectively, we find this enactment to be relevant as to Congress's intent when it enacted the FCA. *See NCNB Texas Nat'l Bank v. Cowden*, 895 F.2d 1488, 1500 (5th Cir. 1990) ("[A] legislative body may amend statutory language to make what was intended all along even more unmistakably clear.") (quoting *United States v. Montgomery County, Md.*, 761 F.2d 998, 1003 (4th Cir. 1985)).

d. Payment of Money

Finally, the Government argues that the Defendants' knowing, material, false statements caused the government to pay out money. Neither party disputes that the government awarded approximately $1.6 million to Lithium Power as a result of the four SBIR grant proposals. Thus, we are left with determining whether the Government has successfully

demonstrated factors one, two, and three of the above test.

2. Analysis

The Government has met its burden with regards to factors one and two – the Defendants knowingly provided false or fraudulent statements in the SBIR grant proposals. Most egregiously, the Defendants lied in all four SBIR grant proposals regarding a cooperative arrangement with the University of Houston and Polyhedron Laboratories. The Defendants argued below that because members of the public could use labs at the University of Houston and Polyhedron Laboratories for a fee, Lithium Power, as a member of the public, had an "arrangement" with both institutions. This argument is patently absurd. The Defendants either purposefully, or with reckless disregard to the truth or the falsity of their statements, misled the BMDO and the Air Force into believing that Lithium Power had a formal partnership with these two organizations. The ability of any member of the public to essentially "rent" the facility is not synonymous with a cooperative arrangement of the type the Defendants hoped the government would infer by their statements. These misrepresentations alone would be sufficient to establish that the Defendants had no intention to perform according to the terms of the SBIR, but these are not the only false statements contained in the SBIR grant proposals.

The Defendants' BMDO Phase I grant contained an incorrect incorporation date for Lithium Power. This was not a mere typographical error, as Lithium Power was not incorporated until five months after it submitted its Phase I grant proposal to BMDO. In addition, the Defendants lied about the existence of Lithium Power's facilities, which were under construction at the time the SBIR Phase I grant proposal was submitted. These false statements, especially when considered in conjunction with the misrepresentation regarding a cooperative arrangement with the University of Houston and Polyhedron Laboratories, left the BMDO with the impression that Lithium Power was a much more established and experienced company than it actually was. Thus, the Defendants had no intention to perform according to the terms as outlined in the BMDO SBIR grant proposals, because they did not portray Lithium Power accurately in the proposals. Because the receipt of a Phase II grant was predicated on the Phase I grant, any false or fraudulent statements made in the BMDO Phase I grant equally taints the BMDO Phase II grant.

We also find troubling Lithium Power's failure to disclose receipt of the BMDO grants when applying for an additional SBIR grant from the Air Force. The SBIR application required applicants to describe "significant activities directly related to the proposed effort" and "previous work not directly related to the proposed effort but similar." Lithium Power states that it told individual members of the Air Force that

it also received the BMDO grants, but that does not negate the fact that it failed to account for the BMDO grants in its SBIR grant proposals to the Air Force. This omission, again when coupled with the misrepresentations regarding Lithium Power's cooperative agreements, establish that the Defendants had no intention to perform according to the terms of the SBIR.

The Government has also successfully demonstrated factor three – Lithium Power's false statements were material. As we explained above, the test for determining whether a false statement is material is whether it has a "natural tendency to influence or is capable of influencing" the government's decision-making. We are convinced that Lithium Power's false statements had the potential to influence the BMDO and Air Force's decisions to award Lithium Power the SBIR grants. Lithium Power painted a picture of an established company, that was so well-respected in the community that it had developed a strong relationship with two notable research organizations. In reality, Lithium Power was a company that was in its preliminary stages of development that had yet to demonstrate any proven success.

Moreover, in the instant case we also have evidence that the false statements actually influenced the decision to award the Defendants the SBIR

grants.[8] One of the BMDO Phase I evaluators recommended approving the proposal because Lithium Power had adequate facilities to conduct the project – in actuality Lithium Power had no such facilities. In addition, another BMDO Phase I evaluator stated that his recommendation to fund Lithium Power's proposal was greatly influenced by the false statements. Finally, the evaluator who approved the Air Force proposals stated that he would not have approved funding the Air Force proposals if the Defendants had included information regarding the BMDO SBIR grants in Lithium Power's Air Force SBIR grant proposal.

Based on the foregoing analysis, we conclude that the Defendants violated the FCA. The irony of this situation is not lost on the court. Lithium Power blatantly deceived the BMDO and the Air Force and received funds that it was not entitled to. But it appears that the company then went on to successfully design and manufacture lithium-based batteries that the BMDO and the Air Force found to be satisfactory. The Defendants ability to deliver on the hoped for "ends," however, does not justify the means it employed to receive the SBIR grants. We affirm the judgment of liability.

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[8] Thus, even if we were to apply the "outcome" materiality standard, we would still conclude that Lithium Power's false statements were material.

C. Damages Award[9]

The district court held that the Government suffered damages in the amount of the grants it paid out to the Defendants in connection with their deceptive proposals – $1,657,455 – and awarded treble damages in the amount of $4,972,365. The Defendants argue that the Government is not entitled to damages because it did not suffer an "injury." The Defendants argue that the district court erred in granting the damages award and state that no "court has ever applied a fraudulent inducement/disgorgement theory in the absence of some tangible injury to the government." In response, the Government argues that the Defendants' false statements caused more than $1.6 million of DoD SBIR funding to be siphoned off by a company with "dubious qualifications" and that the funding should have gone to a better-qualified candidate.

An individual who violates the FCA is liable to the United States for civil penalties of "not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person." *See* 31 U.S.C. § 3729(a). No circuit court has previously addressed the proper method of calculating damages for a fraudulently induced research grant. This Court has held, however, that damages are limited to the

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[9] We review the damages award in this case *de novo*, because it was decided through a motion for summary judgment.

amount that was paid out by reason of the false claim. *United States v. Aerodex, Inc.* 469 F.2d 1003, 1011 (5th Cir. 1972). Before the government may recover treble damages, it must "demonstrate the element of causation between the false statements and the loss." *See United States v. Miller,* 645 F.2d 473, 475-76 (5th Cir. 1981).[10] In *United States v. Bornstein*, the Supreme Court explained that when deducting the "bargain" received from a defendant, a court must begin with the already doubled (and now tripled) amount. 423 U.S. 303, 314 (1976) (superceded on different grounds); *see also United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983).[11]

The contracts entered into between the government and the Defendants did not produce a tangible benefit to the BMDO or the Air Force. These were not, for example, standard procurement contracts where the government ordered a specific product or good. The end product did not belong to the BMDO or the Air Force. Instead, the purpose of the SBIR grant

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[10] At the time *Miller* was decided, the Government could recover only double, not treble, damages under the FCA.

[11] The Career College Association filed as amicus curiae urging support of the district court's damages award. They also argue, however, that in calculating damages the court should subtract the value of the benefit that the Defendants conferred on the Government from the amount the Government paid to the Defendants and then treble this "actual-damages" figure. The proposed method does not comport with the Supreme Court's holding in *Bornstein* or our holding in *Thomas* and we reject it.

program was to enable small businesses to reach Phase III where they could commercially market their products. The Government's benefit of the bargain was to award money to eligible deserving small businesses. The BMDO and the Air Force's intangible benefit of providing an "eligible deserving" business with the grants was lost as a result of the Defendants' fraud. Finally, a direct causal relationship existed between the funds received by the Defendants and their false statements.

In a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants. The district court correctly determined that the proper amount of damages for the four SBIR proposals was the entire amount the Defendants' received – $1,657,455. The district court then correctly multiplied the amount of damages by three, as required by statute, for a trebled damages award of $4,972,365. We affirm the damages award.

D. Claims for Release and Indemnification

The district court ruled that Longhi's agreement to release and indemnify the Defendants from suit related to any "matter prior to execution of" the agreement to sell the stock was unenforceable because (1) federal public policy bars the enforcement of releases in *qui tam* cases, and (2) the FCA prohibits a *qui tam* plaintiff from dismissing a FCA claim. The

Defendants argue that the district court erred and rely on Ninth Circuit case law to support their assertion that if a relator has already filed his claim at the time of signing the release, the courts have enforced the releases. *See United States ex rel. Hall v. Teledyne Wah Chang Albany,* 104 F.3d 230, 233 (9th Cir. 1997). In addition, the Defendants argue that the FCA does not bar the release and indemnification agreement because Longhi's release did not prohibit the Government from pursuing any of the claims in this lawsuit. With respect to the indemnification clause contained on the stock sale agreement, the Defendants argue that the cases cited by the district court address common law claims for indemnification not contractual indemnification, which is governed by the Supreme Court's decision in *Town of Newton v. Rumery,* 480 U.S. 386 (1987). Longhi argues that the district court correctly concluded that the release and indemnification were unenforceable as they apply to Longhi's FCA allegations because, *inter alia,* the text of the FCA invalidates the release.

The Defendants' arguments are unavailing because the release and indemnification clauses are invalid under the plain language of the FCA. When an individual brings a *qui tam* suit under the FCA, the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. *See* 31 U.S.C. § 3730(b)(1). Once filed by the relator, the complaint must remain under seal for at least sixty days, and is not served on the defendant until the court so orders.

§ 3730(b)(2). The Government may choose to intervene and proceed with the action within the sixty days after it receives the complaint, material evidence, and information, but the Government may extend the sixty-day evaluation period with a showing of good cause to the court. § 3730(b)(3). The district court correctly found that Longhi signed the release eleven days after he filed the *qui tam* complaint and was therefore unable to personally dismiss the case. In addition, the district court correctly held that even if the release and indemnification were valid, Longhi could not have entered into it at the time he did without the express knowledge and consent of the United States, because the statutory sixty-day review window still governed. This outcome comports with our decision in *Searcy v. Philips Electronics North America Corp.*, where we held that the United States has absolute power to veto any settlement between a relator and defendant corporation. 117 F.3d 154, 160 (5th Cir. 1997).

Furthermore, the interest in enforcing the release and indemnification clauses are outweighed by public policy concerns. The Supreme Court's decision in *Rumery* establishes the framework for determining whether public policy prevents enforcement of the release and indemnification in the limited context of this *qui tam* case. Specifically, the Supreme Court held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by the enforcement of the agreement." *Rumery,* 480 U.S. at

392 (citation omitted). The public policy interest implicated in this case is the ability of the Government to obtain information from relators it could not otherwise obtain. It is in the Government's best interest to gain full information from the relator. To enforce the release and indemnification clauses contained in the stock sale agreement against Longhi would ignore the public policy objectives expressly spelled out by Congress in the FCA and would provide disincentives to future relators. In addition, enforcing the release and indemnification clauses would encourage individuals guilty of defrauding the United States to insulate themselves from the reach of the FCA by simply forcing potential relators to sign general agreements invoking release and indemnification from future suit. The district court correctly determined that enforcing the release against Longhi is against public policy. We affirm.

E. Defendants' Motion for Summary Judgment

The Defendants argue that the district court should have granted their motion for summary judgment. Because we have affirmed the district court's decision to grant the Government's motion for summary judgment, we find no error.

III. ATTORNEYS' FEES

The Defendants argue that we should reverse the award of attorneys' fees because Longhi failed to

segregate the non-compensable work performed by his counsel. In response, Longhi argues that under the FCA he is entitled to an award of attorneys' fees for all time reasonably expended on his behalf in pursuit of the achieved result. Longhi asserts that it is legally irrelevant that he expended a small, limited amount of time in connection with claims that were not actively litigated in the case.

A. Standard of Review

The parties dispute the applicable standard of review. Only two of our cases, both unpublished, discuss the applicable standard for reviewing a district court's award of attorneys' fees under the FCA. *United States v. Medica Rents Co. Ltd.*, No. 03-11297, 2008 U.S. App. LEXIS 17946, at *1 (5th Cir. 2008); *U.S. ex rel. Bain v. Georgia Gulf Corp.*, 208 F. App'x 280, 282 (5th Cir. 2006). In both instances, we applied an abuse of discretion standard when reviewing a district court's award of attorneys' fees.[12] Thus, we apply an abuse of discretion standard of review to the instant case. In *Bain*, we explained that the abuse of discretion standard of review is consistent with our review of attorneys' fees under similar circumstances. 208 F. Appx. at 282 (citing *Skidmore Energy, Inc. v. KPMG*, 455 F.3d 564, 566

[12] We note that *Bain* and *Medica Rents* involve § 3730(d)(4) of the FCA and the instant case involves § 3730(d)(1) of the FCA. We find this to be a distinction without relevant difference in determining the appropriate standard of review.

(5th Cir. 2006)). "Under the abuse of discretion standard, a district court's decision to award attorneys' fees will not be disturbed unless the award is based on (1) an erroneous view of the law or (2) a clearly erroneous assessment of the evidence." *Id. See also Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Inc.*, 38 F.3d 1414, 1417 (5th Cir. 1994); *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 237-38 (5th Cir. 1990); *Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987) (stating that the ultimate award of attorney's fees is reviewed for abuse of discretion); *EEOC v. First Ala. Bank*, 595 F.2d 1050, 1056 (5th Cir. 1979).

B. Analysis

Section 3730(d)(1) of the FCA states that a relator in a successful *qui tam* action is entitled to "receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." 31 U.S.C. § 3730(d)(1). The question is whether Longhi's attorneys' fee award should be segregated because he was not "successful" in proving a violation of the FCA with regards to all twenty-one contracts, as he initially alleged. We find the Supreme Court's decision in *Hensley v. Eckerhart*, to be instructive. 461 U.S. 424 (1983).

In *Hensley*, the Supreme Court reviewed an award of attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act for fees incurred during

civil rights litigation where the plaintiffs did not prevail on all of their claims. *Id.* at 426. The Court stated that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433 (quotation and internal quotation marks omitted). The Supreme Court explained that a plaintiff might bring distinctly different claims that are based on different facts and legal theories, and in such an instance "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.'" *Id.* at 435 (quotation omitted). The Court also explained, however, that there are sometimes instances where a "plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories." *Id.* at 435. In those instances, where much of counsel's time is "devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis . . . the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

The district court properly noted the standards set out by *Hensley* and expressly determined that the claims regarding the performance on the contracts and the claims alleging fraudulent inducement were not factually distinct. The district court determined that the claims regarding the four SBIR contracts arose from the same set of contracts, same actors, and

the same illegal intent to defraud the government of money in violation of the FCA. The district court also determined that the fees related to the four SBIR contracts should not be segregated from the other claims.

We hold that the district court did not abuse its discretion in finding that the level of success on the four SBIR contract claims alone was sufficient enough to merit entitlement to a full attorneys' fees award. The district court reviewed the billing records and found no duplicative efforts or unnecessary hours, and thus found that Longhi's counsel's billing record to be reasonable. We affirm.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment on all claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *EX REL.* ALFRED J. LONGHI, JR., *Plaintiffs*,	§	CIVIL ACTION H-02-4329
v.	§	
DEFENDANT, *Defendant.*	§	

FINAL JUDGMENT

(Filed Mar. 13, 2008)

Pursuant to the court's order of January 17, 2008 granting the parties' stipulation of dismissal, (Dkt. 116) the court enters FINAL JUDGMENT in this matter. However, the court retains jurisdiction over the relator's motion for attorney's fees, costs, and expenses (Dkt. 117) and will issue an order on the motion at a later time.

This is a FINAL JUDGMENT.

Signed at Houston, Texas on March 13, 2008.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *EX REL.* ALFRED J. LONGHI, JR., *Plaintiffs*,	§	
v.	§	CIVIL ACTION H-02-4329
LITHIUM POWER TECHNOLOGIES, INC., AND MOHAMMED ZAFAR A. MUNSHI, *Defendants*.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jan. 3, 2008)

Pending before the court are the plaintiffs' motion for summary judgment on damages, and defendants' cross-motion for summary judgment on damages. Dkts. 110 & 112. On September 27, 2007, the court granted partial summary judgment for the plaintiffs on their claims against Lithium Power and Mohammed Zafar A. Munshi (collectively "LPT") for violations of the False Claims Act, 31 U.S.C. § 3729(a), on four contract proposals ("the Four Contracts")[1]

[1] Those contracts are: (1) "Army Phase I" – ARMY-8630: F08630-98-C-0066-P00001, Very Thin Rechargeable Battery; (2) "Army Phase II" – ARMY-0018: DAS60-00-C-0018, Very Thin Rechargeable Battery; (3) "Air Force Phase I" – USAF-2122: F33615-C-2048, Micro Electrical Mechanical-MEMs; and (4) "Air

(Continued on following page)

under the Department of Defense's Small Business Innovation Research Program. Dkt. 107. The parties have not moved for summary judgment on the merits of the plaintiffs' remaining claims. Therefore, the damages at issue in this order are limited to those stemming from the fraudulent inducement of the Four Contracts.

I. BACKGROUND

The court incorporates by reference its order granting partial summary judgment on the government's claims. Dkt. 107. At the conclusion of its order, the court wrote as follows:

> The government has unquestionably carried its burden of proof, even under the movant's difficult summary judgment standard, on several false statements contained in the contracts. For example, LPT misrepresented its history and status on the Army Phase I proposal. Also on the Army Phase I proposal, LPT misrepresented the physical facilities that it had. On all four proposals, LPT continuously misrepresented the arrangements – or lack thereof – between itself and Polyhedron Laboratories, and itself and the University of Houston. On the Air Force Phase I and II, LPT misrepresented the amount of related work it had performed

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Force Phase II" USAF-2048: F33615-01-C-2122, Micro Electrical Mechanical – MEMs.

> prior to the Air Force proposals when it did not disclose the prior Army contracts. At one point in its motion LPT argues that the U.S. has made a mountain out of a group of small molehills. But, that encapsulates exactly the overall misrepresentation that LPT made in its proposals. It embellished a whole series of molehills so it could present a mountain of experience, facilities, and novelty to attract the reviewers. All of this was done with at least reckless disregard for the truth of the statements, and in some cases actual knowledge. The court finds that the defendants made false claims in violation of sections 3729(a)(1) and (2) on the contracts designated as Army Phase I, Air Force Phase I, and Air Force Phase II.[2] Therefore, the invoices based on all four contracts at issue here are "false claims" based on a fraudulent inducement theory.

Id. Having found liability on the Four Contracts, the court now moves to the question of the damages to be assessed against LPT.

Analysis

This seemingly simple inquiry presents the court with a novel issue of law. The Fifth Circuit has not addressed the proper way to calculate damages for a fraudulently induced research grant – nor for that

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[2] Each Phase I contract was a prerequisite for Phase II funding. Dkt. 107.

matter has any other Circuit court. In fact, there does not appear to be any one specific standard for damages under the FCA. *See, e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908, 922 (4th Cir. 2003). Instead, courts have used several different damage models – adapting them to the facts of the case. *See, e.g., Morse Diesel Int'l, Inc. v. United States,* ___ Fed. Cl. ___, 2007 WL 3277293 (Fed. Cl. 2007) (pagination not available). A logical starting point seems to be to examine the language and underlying purpose of both the False Claims Act itself and the government program through which the funds were channeled – in this case the Small Business Innovation Research Program. Then, having established a frame of reference, the court can determine which model best suits the damages caused by LPT's misrepresentations.

I. False Claims Act

Sometimes called the Abraham Lincoln Act, the False Claims Act became law in 1863 in response to "widespread corruption and fraud in the sales of supplies and provisions to the union government during the Civil War." 132 CONG. REC. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Glickman). In 1986,[3] finding that fraud had become an even more pervasive and costly problem – approximately $10 to $100 billion annually – Congress again turned to the

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[3] A little more than five score years later.

FCA as its "primary litigative tool for combatting [sic] fraud." S. REP. NO. 99-345, at *3 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67. As the Senate Report went on to point out, "[t]he cost of fraud cannot always be measured in dollars and cents . . . fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." *Id.* In order to make the FCA a more effective deterrent, the report concluded that the Act needed better incentives for relators combined with harsher penalties for violators. *Id.* And, based on the available statistics, the 1986 amendments have certainly achieved their goal.[4]

The court has previously addressed two of the three main areas Congress enhanced in the 1986 amendments: the incentive to the relator, and the level of knowledge required for liability. Dkts. 101 & 107. In this motion, the court must now address the third area enhanced by the 1986 amendments: the penalty scheme. The FCA clearly delineates two

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[4] According to the Department of Justice, as of September 30, 2003, the United States had recovered in excess of 12 billion dollars since Congress passed the 1986 amendments. Press Release, Department of Justice, Justice Dept. Civil Fraud Recoveries Total $2.1 Billion for FY 2003; False Claims Act Recoveries Exceed $12 Billion since 1986 (Nov. 10, 2003) *available at* http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm (last visited Dec. 19, 2007). Moreover, the number of qui tam cases filed jumped from 33 in the year 1987 to 326 in the year 2003 – an increase of over 900%. Taxpayers Against Fraud Education Fund, The False Claims Act Legal Center, Statistics, http://www.taf.org/statistics.html (last visited Dec. 19, 2007).

separate calculations, which comprise the amount of a violator's liability. 31 U.S.C. § 3729(a). First, the court must assess a civil penalty of not less than $5,500 and not more than $ 11,000 for each instance.[5] *Id.* And second, the court must award "3 times the amount of damages which the government sustains because of the act of that person." *Id.* The Supreme Court has described the purpose of the treble damages plus civil penalty framework as making "sure that the government would be made completely whole." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551-52 (1943). At base, the FCA is an aggressive Congressional plan to recover money defrauded from the government, including the costs to recover the defrauded money, in such a way as to be a deterrent to others.

II. Small Business Innovation Research Program

The Small Business Act came into being in 1953. Act of Jul. 30, 1953, ch. 282, 67 Stat. 232 (codified at 15 U.S.C. §§ 631 et seq.). Under the current law, Congress describes the policy underlying the Act as follows:

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[5] Prior to August 30, 1999, the minimum and maximum penalties were $5,000 and $10,000 respectively. *See* 28 C.F.R. § 85.3(a)(9) (2007). Any civil penalties assessed by the court for instances occurring before August 30, 1999 will use the penalty range in force at the time.

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation.

15 U.S.C. § 631(a).[6] In 1958, Congress amended the Small Business Act and added what has come to be known as the Small Business Innovation Research Program. *See* Pub. L. No. 85-536, § 2[9], 72 Stat. 391 (codified at 15 U.S.C. § 638). Congress found that federal research projects went primarily to large firms which in turn led to large federal procurement contracts going to those same large firms who had developed products from those federal grants. S. REP. No. 85-1714 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3071, 3076. The goal of the amendment was to help small businesses obtain government research contracts. *Id.* Congress reasoned that more government research and development contracts going to small businesses would in turn lead to more government procurement contracts and more opportunity in the

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[6] In 1980, Congress made an even stronger policy statement when it declared that it is the "policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary . . . [to] foster the economic interests of small businesses." 15 U.S.C. § 631a.

market as a whole for small businesses. *Id.* The declaration of policy in the current version of the SBIR reflects these goals.

> Research and development are major factors in the growth and progress of industry and the national economy. The expense of carrying on research and development programs is beyond the means of many small-business concerns, and such concerns are handicapped in obtaining the benefits of research and development programs conducted at Government expense. These small-business concerns are thereby placed at a competitive disadvantage. This weakens the competitive free enterprise system and prevents the orderly development of the national economy. **It is the policy of the Congress that assistance be given to small-business concerns to enable them to undertake and to obtain the benefits of research and development in order to maintain and strengthen the competitive free enterprise system and the national economy.**

15 U.S.C. § 638(a) (emphasis added).

Ironically, today's SBIR is big business.[7] In the fiscal year 2007, the Department of Defense alone

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[7] A Google search of the term SBIR retrieves approximately 9 commercial websites – just in the first page of results – touting winning strategies for procuring SBIR funding. For example: www.sbir-sttrgrantshelp.com, www.SBIRcoach.com, and www.

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funded approximately $1.14 billion in SBIR programs. *See* Department of Defense, Small Business Innovation Research & Small Business Technology Transfer, Overview, http://www.acq.osd.mil/osbp/sbir/overview/index.htm (last visited Dec. 19, 2007). Considering the funds tunneled annually into research performed by small businesses, the SBIR has remained true to its stated purpose, allowing small businesses to compete on a level playing field with large research firms and universities.

III. Damages

As discussed above, the FCA does not specify how courts should calculate "the amount of damages which the government sustains because of the act of" the person found liable. 31 U.S.C. § 3729(a). However, case law gives the basic conceptual starting point. The Fifth Circuit has held that damages are limited "to the amount that was paid out by reason of the false claim." *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972). The D.C. Circuit has restated this proposition as "only those damages that would not have come about if the defendant's misrepresentations had been true." *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196, 200 (D.C.Cir. 1995) (citing *United States v. Miller*, 645 F.2d 473, 475-76 (5th Cir. 1981)). For example, in

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sbirworld.com. *See*, Google, Web Search, http://www.google.com/search?hl=en&q=SBIR (last visited Dec. 28, 2007).

Aerodex the Navy contracted with Aerodex for a specific type of bearings. *Aerodex*, 469 F.2d at 1006. Instead Aerodex supplied the Navy with inferior bearings that had been reworked to look like the correct type of bearings. *Id.* When the substitutions were discovered, the Navy spent approximately $160,000.00 removing the inferior bearings from planes in which they were installed and replacing them. *Id.* The court reasoned that the punishable act was the actual presentment of an invoice for specific bearings that the government did not receive. *Id.* at 1011. Since the Fifth Circuit requires a direct causal nexus between the actual false statement and the damage sustained by the government, any consequential damages due to the reworking could not be assessed as part of the damages under the FCA.[8] *Id.* ("The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claim, caused the consequential damages."). Put another way, if Aerodex had submitted invoices that reflected the correct part number and that the bearings were reworked, the government's remedy would not lie in the False Claims Act at all. Although, the Fifth Circuit has not had an opportunity to address the method for calculating actual damages since the FCA was amended, it is

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[8] The court did, however, allow recovery of the consequential damages under a breach of warranty theory. *United States v. Aerodex*, 469 F.2d 1003, 1011-12.

likely that it will continue to use the proximate cause model. In the instant case, the court has already determined that the false statements in LPT's proposals were actually material. Dkt. 107 at 32-35. Therefore, a direct causal relationship exists between all funds received under the Four Contracts and LPT's false statements.

A. Benefit of the Bargain Theory

The defendant urges the court to adopt a benefit of the bargain approach to damages in this case. LPT's argument is very simple: the government got what it paid for and was therefore not damaged.[9] And, there is some case law to support this concept. *See, e.g., Harrison,* 352 F.3d at 923; *United States ex rel. Stebner v. Stewart & Stevenson,* 305 F. Supp. 2d 694, 701 (S.D.Tex. Jan. 30, 2004); *Ab-Tech Constr., Inc. v. United States,* 31 Fed. Cl. 429 (1994). *But cf. Young-Montenay, Inc. v. United States,* 15 F.3d 1040, 1043 n. 3 (Fed. Cir. 1994) (upholding the lower court's finding that the government sustained actual loss when it was "denied the use of the overpaid money."). In most of the cases where courts found that the government

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[9] The government sought, and the court granted, summary judgment based solely on a theory of fraudulent inducement. Dkt. 107. Therefore, the court assumed for the sake of argument that the invoices were accurate. However, the court made no findings with regard to the accuracy of the invoices and as explained later in this opinion, its adoption of the fraudulent inducement theory should not be regarded as such.

had gotten the benefit of its bargain, the contract at issue was some type of procurement contract the end product of which was tangible and had value to the government. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 96 S. Ct. 523 (1976) (radio kits); *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002) (helicopters); *Stebner*, 305 F. Supp. 2d at 701 (trucks with non-corrosive treatment); *Ab-Tech*, 31 Fed. Cl. at 431-32 (data processing system). In some instances, the goods were conforming and accepted by the government, but due to collusive bidding or under-delivery the government was overcharged. Under those circumstances, many courts have measured damages as the difference between what the government paid for the items or services and what the government should have paid. *See, e.g., United States v. Coop. Grain & Supply Co.*, 476 F.2d 47, 61-65 (8th Cir. 1973); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966). In other procurement cases, when goods were non-conforming, the courts have fashioned appropriate damages based on the facts of the case and the value of the end-product received. *See Aerodex*, 469 F.2d at 1006 (allowing recovery of full amount of contract for unusable non-conforming goods); *Faulk v. United States*, 198 F.2d 169, 172 (5th Cir. 1972) (damages included a estimate of the amount of sub-standard milk left in soldiers' glasses on the mess hall tables). The Fifth Circuit has recognized that whatever damage model a court chooses, it must provide some type of deterrent. *Faulk*, 198 F.2d at 172 ("Under [appellant's suggested jury instruction on damages] appellant would not have

risked losing anything by his misconduct except the illegal profit to which he was never entitled anyway, while had he never been brought to account for his fraud he would have been free to enjoy his unlawful gains with impunity.").

However, the benefit of the bargain analysis cannot completely relieve a defendant from actual damages. In *United States v. Bornstein,* the defendant had already made compensatory payments to the government. *Bornstein,* 423 U.S. at 314. Defendant argued that all compensatory payments should be subtracted before the damages were multiplied. *Id.* The Supreme Court disagreed and held that the total or gross amount of damages should first be doubled (now tripled) and only then should any compensatory payments or set-offs be subtracted. *Id.* at 316. The Court explained that this method would (1) help compensate the government for the "costs, delays, and inconveniences occasioned by fraudulent claims"; (2) keep penalties consistent among violators guilty of similar acts; and (3) prevent violators from avoiding damages by simply paying the government back at any time before judgment. *Id.* at 315-16. Therefore, even if the court agreed with LPT's argument that the government got what it paid for – which it does not – *Bornstein* holds that the total amount paid out under the four contracts must first be tripled, and only then whatever value the government received from LPT under the Four Contracts would

be subtracted.[10] The Fifth Circuit agrees. *See United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983) ("The damages must be doubled [now tripled] and then reduced by the amount of any previous payments on the claim."). Moreover, this damage model holds true even when the claims at issue are not for procurement contracts. *See United States ex rel. Purcell v. MWI Corp.,* ___ F. Supp. 2d ___, 2007 WL 3287443 (D.D.C. Nov. 6, 2007) ("The math my be [sic] tricky, but the case law is simple: fraudulently induced government loans (even if eventually repaid in full) are part of the original loss to the government.") (citing *Bornstein,* 423 U.S. at 316; *United States v. Globe Remodeling Co.,* 196 F. Supp. 652 (D.Vt.1960) (insurance); *United States v. Ekelman & Assocs., Inc.,* 532 F.2d 545, 550 (6th Cir. 1976) (mortgage loans); *United States v. Hill,* 676 F. Supp. 1158, 1182 (N.D. Fla. 1987) (guaranteed

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[10] Notably, the *Bornstein* case has been cited by other courts for the proposition that "[t]he Government's actual damages are equal to the difference between the market value of the [items under contract] it received and retained and the market value that the [items] would have had if they had been of the specified quality." *United States ex rel. Roby v. Boeing Co.,* 302 F.3d 637, 646 (6th Cir. 2002); *United States v. TDC Mgmt.,* 288 F.2d 421, 428 (D.C.Cir. 2002); *Commercial Contractors, Inc. v. United States,* 154 F.3d 1357, 1372 (Fed. Cir. 1998). However, this comment on the part of the Court is dicta as evidenced by both its placement in a footnote and its reference without disparagement to two Fifth Circuit cases where the court did not use this formula. *Cf. United States ex rel. Fago v. M & T Mortgage Corp.,* ___ F. Supp. 2d, 2007 WL 2840412 at *17 (D.D.C. Oct. 2, 2007). Unsurprisingly, neither the Fifth Circuit nor any district court in the Fifth Circuit has ever cited *Bornstein* for this proposition.

bank loans); *United States v. Heck,* No. 86-0875 (SSB), 1987 WL 49253, at *6 (D.N.J. Mar. 26, 1987) (mortgage loans)). Accordingly, the question really becomes what was the benefit of the government's bargain with LPT.

B. The Benefit of the Government's Bargain

Assuming for the sake of argument that the four contracts were standard procurement contracts and damages could be measured using some type of *quid pro quo,* the government has not received the benefit of its bargain for two main reasons. First, the contracts produced no tangible benefit to the government. A standard procurement contract is usually an agreement for an end product like the construction of a bridge, or delivery of a specific widget. In those cases, although the bidding may have been tainted in some way or the cost overruns may have been fraudulent, at the end of the day, the government owned a bridge or some widgets. Under a standard benefit of the bargain model, the government should not be able to keep its bridge or widgets – assuming they are conforming – and get damages for the entire amount it paid. RESTATEMENT (SECOND) OF TORTS § 549. Here, however, there is no tangible end product belonging to the government. As explained in the court's previous order, the SBIR program consists of three phases. Dkt. 107 at 1-2. In Phase III, the small business must obtain its own funding and take its product to market. 15 U.S.C. §§ 638(e)(4)(C) & 638(r);

see also Dkt. 67, Ex. 8 at 1. The batteries developed through the SBIR funding belong to LPT – not the government. *Id.* And, as evidenced by its own statements in its proposals and final reports, LPT had every intention of marketing those batteries to the government and private industry. *See, e.g.*, Dkt. 67, Ex. 2 at 6 ("The time is ripe to exploit our advances in a market-driven battery that tentuples [sic] the energy per dollar of a rechargeable battery."); *see also* Dkt. 67, Ex. 1 at 17 ("LPT's strategy and goals in the commercialization of this product will be first to obtain adequate patent protection on its ideas, processes and developments," then to manufacture the batteries for the BMDO and other small niche markets, and last to license the technology to "the larger commercial and military sectors for applications such as space use, weaponry, consumer portable electronics and electric vehicles. . . ."); Ex. 2 at 32 (listing potential markets as cellular phones, laptops, handheld devices, geophysical equipment, and medical devices); and Ex. 3a at 42 (In addition to the Air Force, "our immediate customers will be Micromodular Data Solution, Inc. (San Jose, CA) and Telpus Groups for credit card size batteries; Cyberfinders for smart watch with telecommunications capabilities; and Stanford University for Mesicopter batteries and an interest from Rujisink, a German company, for micro model airplanes and model helicopters.")..Therefore, even if the court treated this contract like a standard procurement contract – which it most distinctly is not – the defendants would be liable for all sums paid out under all four contracts for the simple reason that the

government has no tangible assets of value as a result of the contracts.

Second, even if the benefit to the government was the invention of these precise batteries, the Fifth Circuit has expressly rejected this "no harm, no foul" argument. For example, in *Aerodex,* the defendants argued that the bearings they actually supplied – rather than the ones for which the Navy contracted – were considered interchangeable by the entire aviation industry. *Aerodex,* 469 F.2d at 1007. The court disagreed and explained that "[t]he mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency." *Id.* Although, the *Aerodex* court eventually found that the two type of bearings were not, in fact, interchangeable, it based its holding in part on the falsity of the statement rather than the end product delivered. *Id.* at 1008, 1011.

Later, in *Peterson v. Weinberger,* the Fifth Circuit again rejected a "no harm, no foul" argument. 508 F.2d 45 (5th Cir. 1975). In *Peterson,* James Peterson submitted Medicare claims for physical therapy performed by Peterson's company, but used his brother's name and provider number. *Id.* at 48. Peterson argued that the patients had received the physical therapy performed by qualified people, so the government was not harmed. *Id.* at 52. The court rejected this argument as unsound, explaining that had Peterson submitted the claims under his own name, they would not have been paid. *Id.* The benefit of the

government's bargain was medical services provided by *eligible* doctors. *Id.* Even though fully qualified staff may have performed the physical therapy, the claims for payment were false. Therefore, the court found that the government had been damaged for the full amount.

In the instant case, according to the testimony of the reviewers assigned to the LPT proposals, had LPT submitted truthful proposals, neither reviewer would have recommended the proposals for funding. Dkt. 107 at 33-35. As in *Peterson*, the person who performed the work under the contracts – assuming *arguendo* that all of the work was completed and not duplicative – was not the person eligible to receive funds under the government program. The government's benefit of the bargain was to award money to *eligible* deserving small businesses. That is precisely what LPT denied to the government. Accordingly, the government did not get the benefit of its bargain.

C. Value of the SBIR Programs

The government argues that it has been damaged for the entire amount of SBIR funding under the four contracts. According to it, the government's total damage is incalculable. Through LPT's fraudulent inducement of the SBIR research funds, it diverted those same funds from deserving eligible small businesses, undermining Congress's objectives for the SBIR program. The funds for each SBIR program are finite. Additionally, the government reminds the

court, that there is simply no way to measure the innovations lost by not funding these other, deserving, small businesses. Lastly, the government argues that LPT's misrepresentations went directly to the heart of the SBIR programs – their ability to perform research on technology that was novel and innovative. The question becomes: what is the value derived by the government from its SBIR programs?

LPT could argue that the value the government received from all of this was the availability of battery technology that did not exist prior to LPT's research. Therefore, it could be argued that the government did receive value – albeit intangible value – from LPT in return for funding. But, that argument would misstate the whole purpose of funding under the SBIR. The government's objective, both statutorily and contractually, is not to confer a benefit upon itself. *See* 15 U.S.C. § 638(a). Instead, its goal is to give funding opportunities to small businesses to make those businesses more competitive. *Id.; see also* 15 U.S.C. § 631(a). If, for example, Congress had merely wanted the innovation for the Department of Defense, it had many other more straightforward means of achieving that goal. The SBIR and STTR[11]

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[11] The STTR Program is the Small Business Technology Transfer Program. It was created in 1992 and funds cooperative research projects between a small business and research institution. 15 U.S.C. § 638(n)-(p); Department of Defense, Small Business Innovation Research Small Business Technology Transfer, Overview, http://www.acq.osd.mil/osbp/sbir/overview/index.htm (last visited Dec. 26, 2007).

programs could have been recodified under Chapter 63 of Title 15, entitled Technology Innovation. 15 U.S.C. §§ 3701 et seq.[12] Or, they could have been added to Chapter 148 of Title 10 authorizing cooperative agreements for research and development projects for the armed forces. 10 U.S.C. §§ 2511-2519. Congress did neither of these things. It chose instead to enact the programs under the umbrella of the Small Business Act with the stated purpose of encouraging entrepreneurship and free competition. 15 U.S.C. § 631(a).

The D.C. Circuit has recently had occasion to address a government program whose value was lost entirely though [sic] fraud. In *United States v. TDC*

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[12] It is the purpose of this chapter to improve the economic, environmental, and social well-being of the United States by –

> (1) establishing organizations in the executive branch to study and stimulate technology;
>
> (2) promoting technology development through the establishment of cooperative research centers;
>
> (3) stimulating improved utilization of federally funded technology developments, including inventions, software, and training technologies, by State and local governments and the private sector;
>
> (4) providing encouragement for the development of technology through the recognition of individuals and companies which have made outstanding contributions in technology; and
>
> (5) encouraging the exchange of scientific and technical personnel among academia, industry, and Federal laboratories.

15 U.S.C. § 3702.

Management Corporation, Inc., the defendant TDC had contracted with the Urban Mass Transit Authority to find private investors and sureties for minority enterprises wanting to bid on large transportation construction projects. 288 F.3d 421, 422-23 (D.C. Cir. 2002). TDC's role in the project was as an impartial ombudsman. *Id.* However, TDC did not maintain its impartiality. *Id.* at 428. TDC began charging fees to the minority businesses for its assistance, and participating in joint ventures with private investors. *Id.* The D.C. Circuit agreed "that the Program no longer had any value to the government." *Id.* Additionally, the court explained that the valuation of damages was different from regular benefit of the bargain FCA cases, because the Program "did not call for TDC to produce a tangible structure or asset of ascertainable value." *Id.* (distinguishing *Ab-Tech Construction, Inc. v. United States,* 31 Fed. Cl. 429 (1994) and *United States v. Woodbury,* 359 F.2d 370, 379 (9th Cir. 1966)).

However, the loss of the intangible benefit of a program does not automatically vitiate the value of the program. In *Ab-Tech Construction v. United States,* Ab-Tech contracted with the government to build an automated data processing facility. 31 Fed. Cl. 429, 431-32 (1994). The agreement was made under the auspices of Section 8(a) of the Small Business Act which mandates that subcontracts be given to small businesses owned and controlled by "socially and economically disadvantaged individuals." *Id.* In violation of the SBA's mandate, Ab-Tech entered into an indemnity agreement with a third company which,

had it been revealed to the Small Business Administration, would not have been approved. *Id.* at 432-34. The court found that "by deliberately withholding from SBA knowledge of the prohibited contract arrangement with [the third company], Ab-Tech not only dishonored the terms of its agreement with that agency but, more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program." *Id.* at 434. The government asked the court for damages equaling the amount of the progress payments made under the contract – $1.4 million out of a total $1.5 million – times three. *Id.* The court declined saying that the government had suffered no damages because it "got essentially what it paid for – an automated data processing facility built in accordance with the contract drawings and specifications." *Id.* Notably, however, the government had a tangible asset of value at the end of the contract. The Sixth Circuit has explained that even under a benefit of the bargain theory, if the end-product has no value to the government, then it is entitled to full recovery. *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 304 (6th Cir. 1998). Since the legislative history of the SBIR demonstrates that the value of the program lies not in innovation, but in innovation *by eligible small businesses,* it is clear that any alleged end-product of the Four Contracts is valueless from the government's standpoint.

C [sic]. Actual Damages

Although they differ dramatically on the nature of the government's intended benefit under the Four Contracts, the parties agree that whether the government received a benefit is the heart of the question. If the benefit is tangible, like a bridge or a widget (or a battery), then the government has no end-product. The SBIR was expressly written to foster commercialization by the small businesses, not produce bridges or widgets.[13] 15 U.S.C. §§ 631(a), 631a7 638(a). If the government has gained some intangible benefit because of the invention of these new batteries, that is clearly offset by the lost opportunity for innovation by the eligible deserving small businesses that did not receive the funds which LPT fraudulently induced from the government. There is simply no way to speculate whether an eligible small business would have created an innovation of greater or lesser value. If the benefit to the government is the encouragement of entrepreneurship and free competition by eligible small businesses, then the government again has gained no benefit. Therefore, the proper amount of actual damages for the Four Contracts is the amount paid out on the Four Contracts – $1,657,455.00 – multiplied by three for a total of $4,972,365.00.

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[13] Under the general terms of the Department of Defense's SBIR Program, it retains a royalty-free license to use the innovation, but no intellectual property rights. Dkt. 67, Ex. 8(a) at 12. However, the license has no value to the government because (1) it is not in the business of manufacturing batteries, and (2) it is not the benefit contemplated by the SBIR.

LPT argues that "the government is seeking a windfall so great that it would offend due process under the Fifth Amendment." Dkt. 112 at 7. This argument misstates the law. The Supreme Court in *Cook County, Illinois v. United States ex rel. Chandler* explained that the FCA's treble damage provision is not the equivalent of classic punitive damages. 538 U.S. 119, 120 (2003). Because the FCA has no provision for compensatory damages, the treble damages amount is intended to repay the government for the expense of tracking down and prosecuting the fraud. *Id.* Additionally, the FCA requires that a percentage of the award be paid to the relator. *Id.* Moreover, "Congress considered and was satisfied that the 1986 amendments to the False Claims Act did not violate any constitutional rights." *Morse Diesel Int'l, Inc. v. United States,* ___ Fed. Cl. ___, 2007 WL 3277293 (Fed. Cl. 2007) (citing 132 CONG. REC. S9806 (1986)) (pagination not available). The treble damages plus civil penalty framework relates directly to Congress's goal of deterring the rampant fraud in federal contracting. *Id.* (providing an exhaustive examination of the Due Process argument in an FCA context). Therefore, an award of treble damages does not violate the Constitution. As for LPT's "windfall" argument, it is specious at best. Moreover, no matter what damages the court awards, LPT still has all of its intellectual property. Accordingly, the windfall argument also fails.

And last, LPT argues that "[n]o court has ever applied a fraudulent inducement/disgorgement theory

in the absence of some tangible injury to the government." Dkt. 112 at 6-7. LPT cites *Harrison* and *Laird* for this proposition. Neither case supports this position. *Laird* found that there had been no false statement and thus never addressed damages. *United States ex rel. Laird v. Lockheed Martin Engineering & Science Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007). *Harrison* addressed damages in the situation where there was a tangible *benefit* to the government, not a lack of tangible *injury*. *Harrison*, 352 F.3d at 923. The court in *Harrison* was unwilling to make the defendant contractor disgorge all of the money that the government paid under its contract, because the government had received the benefit of the work performed. *Id.* However, this holding does not support the reverse proposition that absent a tangible injury disgorgement is inappropriate. Additionally, this argument is weakened because the facts here are novel.

D. Civil Penalty

The second part of the penalties awarded under the False Claims Act is a civil penalty of not less than $5,500 and not more than $11,000. 31 U.S.C. § 3729. The government argues that the court should assess a penalty for each of the 54 vouchers submitted under the Four Contracts. And, case law suggests that a forfeiture for each invoice may be appropriate. *Bornstein*, 423 U.S. at 311; *see also United States ex rel. Marcus v. Hess*, 317 U.S. 537, 552, 63 S. Ct. 379 (1976); *Faulk*, 198 F.2d at 171. LPT argues that it

should be subject only to the minimum fine, and then only once for each of the Four Contracts. Dkt. 112 at 7. However, in support of this, it merely offers the same arguments discussed in the section above.

The calculation of the forfeitures, both in number and amount is not automatic. In *Bornstein*, the Court cautioned that courts should focus on "the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Bornstein*, 423 U.S. at 313. For example in *Bornstein*, the government asked for a forfeiture on each of the 35 invoices submitted for the radio tubes at issue. *Id.* But, the district court assessed only one forfeiture, because the radio tubes were shipped under one contract. *Id.* However, the Supreme Court found that the subcontractor had committed three separate causative acts – three shipments of falsely marked tubes. *Id.* Therefore, the subcontractor was liable for three forfeitures. *Id.*

In *Hess*, electrical contractors colluded to remove competition from the bidding process for P.W.A. contracts. *Hess*, 317 U.S. at 543. The government argued that it was entitled to a forfeiture on "every form submitted by respondents in the course of their enterprise." *Id.* at 552. The defendants argued that there should be only one single forfeiture. *Id.* The district court decided that instead a forfeiture would be paid for each separate P.W.A. project. *Id.* The Supreme Court agreed, saying that "[t]he incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate

bags in a post office." *Id.; see also United States v. Krizek,* 111 F.3d 934, 939 (D.C. Cir. 1997) ("The gravamen of these cases is that the focus is on the conduct of the defendant. The Court asks, 'With what act did the defendant submit his demand or request and how many such acts were there.'") (citing *Miller v. United States*, 550 F.2d 17, 24 (1977) (assessing five forfeitures because contractor sent five monthly billings even though each billing contained eleven separate invoices); *United States v. Woodbury,* 359 F.2d 370, 378 (9th Cir. 1966) (ten forfeitures awarded on ten applications for payment containing numerous invoices each); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.,* 46 F. Supp. 2d 546, 554 (E.D.La. Apr. 27, 1999) *rev'd on other grounds* 244 F.3d 486 (5th Cir. 2001) ("It is the number of applications for funds, and not the number of coded items on each application, or the number of invoices generated by the applications, or the number of contracts the applications represent, that determines the number of claims made"). *But see United States v. Conway TEC Corp.,* No. H-86-1198, 1996 WL 41842 at *1 (S.D.Tex. Jan. 23, 1996) (Black, J.) (fifty-two forfeitures on fifty-two invoices). Accordingly, the court considers the acts of the defendants in determining the number of forfeitures.

In the instant case, like *Hess,* liability was predicated on fraudulent inducement of contracts. In *Hess,* the Court assessed a forfeiture for each contract. *Id.* Here, the government moved for and the court granted summary judgment on liability premised on

the fraudulent inducement of the Four Contracts. In its order, the court stated that:

> The court finds that the defendants made false claims in violation of sections 3729(a)(1) and (2) on the contracts designated as Army Phase I, Air Force Phase I, and Air Force Phase II. Therefore, the invoices based on all four contracts at issue here are "false claims" based on a fraudulent inducement theory.

Dkt. 107. However, the court made no finding regarding the falseness of the individual invoices themselves. Instead, the court found that the false statements were the Four Contracts and that falseness was imputed to the invoices. The court's statement was based in part on the Supreme Court's finding in *Hess* that "[t]his fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A." *Hess,* 317 U.S. at 542-43. In *Hess,* although the Court imputed the taint to every demand for money, it only awarded forfeitures on each P.W.A contract. *Id.* at 552. *Hess* then would suggest that although the invoices are tainted by the initial fraud, it is the contracts themselves that trigger the forfeiture. This methodology comports with the Court's holding in *Bornstein* awarding forfeitures on each of the defendant's causative acts. *Bornstein,* 423 U.S. at 313. Here, the court has found that the causative acts are the Four Contracts. Therefore, in light of *Bornstein* and *Hess,* the court will assess one forfeiture for each

of the Four Contracts. However, because the defendants' fraud was systematic and knowing, the court will assess the maximum amount for each forfeiture. The forfeiture for Army Phase I is $10,000 and the forfeiture for each of the remaining three contracts is $11,000.[14] Therefore, the total forfeiture is $43,000.00.

IV. Conclusion

Pending before the court is the plaintiffs' motion for summary judgment on damages, and defendants' cross-motion for summary judgment on damages. Dkts. 110 & 112. Upon consideration of the motion, response, reply, the record, the applicable, and for the foregoing reasons, the court awards damages as follows:

It is ORDERED that for the contract designated by the court as Army Phase I, judgment is entered against the defendants for $175,605.00 (3 x $58,535.00) in actual damages, plus a forfeiture of $10,000.00.

It is further ORDERED that for the contract designated by the court as Army Phase II, judgment is entered against the defendants for $2,247,444.00

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[14] Prior to August 30, 1999, the minimum and maximum penalties were $5,000 and $10,000 respectively. *See* 28 C.F.R. § 85.3(a)(9) (2007). The Army Phase I Contract predated the change in civil penalties. Therefore, the court awards a civil penalty based on the rule in place at the time of the offense.

(3 x $749,148.00) in actual damages, plus a forfeiture of $11,000.00.

It is further ORDERED that for the contract designated by the court as Air Force Phase I, judgment is entered against the defendants for $299,973.00 (3 x $99,991.00) in actual damages, plus a forfeiture of $11,000.00.

It is further ORDERED that for the contract designated by the court as Air Force Phase II, judgment is entered against the defendants for $2,249,343.00 (3 x $749,781.00) in actual damages, plus a forfeiture of $11,000.00.

The total damages are $4,972,365.00 in actual damages for money paid out by reason of the false claim, plus $43,000.00 in civil forfeitures for a total of $5, 015,365.00 plus post judgment interest of 3.28%.

Finally, for all of the reasons enumerated above, LPT's cross-motion for summary judgment is DENIED. Dkt. 112.

It is so ORDERED.

Signed at Houston, Texas on January 3, 2008.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *EX REL.* ALFRED J. LONGHI, JR., *Plaintiffs,*	§	
v.	§	CIVIL ACTION H-02-4329
LITHIUM POWER TECHNOLOGIES, INC., AND MOHAMMED ZAFAR A. MUNSHI, *Defendants.*	§	

ORDER

(Filed Sep. 27, 2007)

Currently pending before the court are three motions for partial summary judgment. The plaintiffs, the United States and Longhi (collectively the "U.S.") move for partial summary judgment as to liability under the False Claims Act on four of the five contracts that are the subject of the claims in which the United States has joined.[1] Dkt. 68. Additionally, the defendants, Lithium Power Technologies, Inc. and Mohammed Zafar A. Munshi (collectively "LPT") have filed cross-motions for partial summary judgment as to liability on the same claims. Dkts. 83 & 89. Upon

[1] The relator Longhi has many other claims in which the United States has elected not to join.

consideration of the motions, the responses, the replies, the considerable summary judgment record, and the applicable law, the plaintiffs' motion for partial summary judgment is GRANTED, and the defendants' cross-motions are DENIED.

I. BACKGROUND

A. The Small Business Innovation Research Program

The funds at issue in this case are all derived from awards under the federal Small Business Innovation Research ("SBIR") Program. Although the Small Business Administration ("SBA") governs, monitors, and analyzes the program, individual federal agencies administer funding under the SBIR. Any federal agency with a research and development budget in excess of $100 million must administer an SBIR program. Applicants for funding under the program submit proposals to the individual agencies. The program is extremely competitive, and each agency makes its funding decisions without input from other agencies or the SBA.

Phase I proposals, or startup proposals, are granted to allow a business to explore the feasibility of its ideas. Phase I proposals may be funded for a time period of approximately six months for up to $100,000. Upon the successful completion of a Phase I program, award winners generate a final report for the supervising agency. Only Phase I award winners may submit a next-step or Phase II proposal. Phase II

funding for research and development lasts up to two years and is subject to a cap of $750,000. Additionally, during this time the business should assess the commercial potential of the idea or technology. Again, upon completion of the Phase II program, award winners generate a final report for the supervising agency. Finally in Phase III, the business takes the idea developed through Phases I and II and introduces it to the market. The SBIR program does not extend to Phase III.

B. Lithium Power's SBIR funded proposals

LPT came into being in 1998 as the successor to a series of companies run by defendant Mohammed Zafar A. Munshi. According to Munshi, LPT was founded "to conduct research and development on advanced lithium primary and secondary batteries and various capacitor technologies, including aluminum electrolytic, plastic film, electrochemical and high energy density ceramic capacitors." Dkt. 67, Ex. 1. The contracts that are at issue in this motion are the result of funded proposals under Department of Defense SBIR programs administered by the Army Space and Missile Defense Command ("ASMDC"), the Ballistic Missile Defense Organization ("BMDO"), and the Air Force. In total, the contracts spanned a 6 year period from 1998 through 2004 with some substantial overlap.

Date	Army Phase I	Army Phase II	Air Force Phase I	Air Force Phase II
1/10/1998	Proposal Submitted			
8/1/1998	Work Begins			
3/15/1999	Work Completed			
5/3/1999	Final Report			
7/12/1999		Proposal Submitted		
1/11/2000			Proposal Submitted	
2/25/2000		Work Begins		
3/29/2000			Work Begins	
10/27/2000				Proposal Submitted
12/28/2000			Work Completed	
1/20/2001			Final Report	
3/28/2001				Work Begins
2/24/2002		Work Completed		
4/19/2002		Final Report		
7/27/2003				Work Completed
4/1/2004				Final Report

The ASMDC contract was the Phase I proposal for the development of very thin rechargeable batteries. For ease of identification, the ASMDC Phase I contract will be designated Army Phase I.[2] The BMDO contract was the follow-up contract, or Phase II, of the development of very thin rechargeable batteries. The BMDO contract will be designated Army Phase II. The Air Force contracts – Air Force Phase I and Air Force Phase II – were funded to study the feasibility of microelectricalmechanical systems ("MEMS") batteries using solid electrolytes for micro-satellites. LPT has derived the lion's share of its income from government-funded research programs. In fact, during the period in question, LPT garnered over $5.8 million in government funds for research.

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[2] Both parties have conceived their own systems of nomenclature for identifying the contracts. The nomenclature has changed from pleading to pleading. In their motion, the plaintiffs suggest that the contracts be labeled chronologically 1 through 4. While this has a certain logic, it does not maintain the Phase I and Phase II relationship among the four contracts. The defendants would prefer that the contracts be designated BMDO Phase I and II, and Air Force Phase I and II. Again, there is a certain logic to their system. However, given the option between BMDO, ASMDC, and Army, the best choice for ease of use seems to be a word rather than an acronym. The choice of designation in no way reflects any finding of fact regarding the supervising agency of the contracts.

C. Alfred J. Longhi, Jr. – The Relator

In 1997, the relator, Alfred J. Longhi, Jr., who was not an LPT employee, began recruiting investors for LPT and later invested his own money in the venture. Dkt. 27. In March of 2000, he joined LPT and became vice-president for sales and marketing. *Id.* During his time as an employee at LPT, Longhi became aware of the defendants' alleged schemes to defraud the government. *Id.* In November of 2002, Longhi sold his LPT stock back to the company, resigned his position, and filed this *qui tam* action. *See* Dkt. 101.

D. Procedural History

Longhi originally filed his complaint under seal on November 18, 2002. Dkt. 1. After several years of investigation, the civil division of the U.S. attorney's office elected to intervene in only those claims related to "the allegations pertaining to duplicative research and work, and the fraudulent billing related to that duplicative research and work" on the four contracts at issue in this motion[3] and claims related to one additional non-SBIR contract with NASA,[4] not part of

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[3] Those contracts are: (1) ARMY-8630: F08630-98-C-0066-P00001, Very Thin Rechargeable Battery; (2) ARMY-0018: DAS60-00-C-0018, Very Thin Rechargeable Battery; (3) USAF-2122: F33615-C-2048, Micro Electrical Mechanical-MEMs; and (4) USAF-2048: F33615-01-C-2122, Micro Electrical Mechanical-MEMs.

[4] That contract is NAS3-01189, NRA Polymer Electrolytes.

this motion.[5] Dkt. 20. Shortly thereafter, on October 10, 2005, the court unsealed the complaint and election notice. Dkt. 23. Munshi was served a week later, on October 17, 2005. Dkt. 26.

The U.S. complaint alleged violations of 31 U.S.C. §§ 3729(a)(1) & (2) – the False Claims Act, payment by mistake of fact, unjust enrichment, and common law fraud. Dkt. 24. The Longhi complaint alleged only violations of the False Claims Act, but encompassed many more alleged instances of fraud. Dkt. 27. LPT answered the U.S. complaint on November 7, 2005. Dkt. 28. In a separate document, LPT also answered Longhi's complaint and asserted counterclaims against Longhi for breach of contract and indemnification, and breach of fiduciary duty. Dkt. 36.

Both plaintiffs moved for partial summary judgment on liability under the False Claims Act on four out of the five contracts named in the U.S. complaint. Dkt. 67. LPT cross moved for partial summary judgment on those same claims. Dkts. 83 & 89. Additionally, LPT moved for summary judgment with respect to the *qui tam* claims of the relator based on a release signed by the relator at the time of his separation from LPT. Dkt. 91. On March 23, 2007, the

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[5] In a separate criminal action, the government executed a criminal subpoena and seized approximately 40 boxes of documents from LPT in December 2002. *See* Dkt. 53. Ultimately, the criminal division of the U.S. attorney's office decided not to bring criminal charges against Munshi and LPT.

court denied LPT's motion for summary judgment on the relator's claims and dismissed LPT's counterclaim against the relator for breach of contract and indemnification. Dkt. 101. All discovery has been stayed pending a ruling by the court on the plaintiffs' motion for partial summary judgment and the defendants' cross motions for partial summary judgment. Dkt. 100.

II. STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P.56(c); *see also Christopher Village, L.P. v. Retsinas,* 190 F.3d 310, 314 (5th Cir. 1999). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, there must be an absence of any genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248 (1986). An issue is "material" if its resolution could affect the outcome of the action. *Daniels v. City of Arlington, Tex.,* 246 F.3d 500, 502 (5th Cir. 2001), *cert. denied,* 122 S.Ct. 347 (2001). "[A]nd a fact is genuinely in dispute only if a reasonable jury could return a verdict for the non-moving party." *Fordoche, Inc. v. Texaco, Inc.,* 463 F.3d 388, 392 (5th Cir. 2006).

The moving party bears the initial burden of informing the court of all evidence demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Only when the moving party has discharged this initial burden does the burden shift to the non-moving party to demonstrate that there is a genuine issue of material fact. *Id.* at 322. If the moving party fails to meet this burden, then they are not entitled to a summary judgment and no defense to the motion is required. *Id.*

"For any matter on which the non-movant would bear the burden of proof at trial . . . , the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Transamerica Ins. Co. v. Avenell,* 66 F.3d 715, 718-19 (5th Cir. 1995); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25 (1986). To prevent summary judgment, "the non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (quoting FED. R. CIV. P. 56(e)).

When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. *Adams v. Travelers Indem. Co. of Conn.,* 465 F.3d 156, 163-64 (5th Cir. 2006). The court must review all of

the evidence in the record, but make no credibility determinations or weigh any evidence, disregard all evidence favorable to the moving party that the jury is not required to believe, and give credence to the evidence favoring the nonmoving party as well as to the evidence supporting the moving party that is uncontradicted and unimpeached. *Jones v. Robinson Property Group, L.P.*, 427 F.3d 987, 993 (5th Cir. 2005). However, the nonmovant cannot avoid summary judgment simply by presenting "conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation." *See TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). By the same token, the moving party will not meet its burden of proof based on conclusory "bald assertions of ultimate facts." *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978); *see also Galindo v. Precision Amer. Corp.*, 754 F.2d 1212, 1221 (5th Cir. 1985).

III. The False Claims Act

"The civil False Claims Act imposes liability on any person who knowingly submits, or causes the submission of, a false or fraudulent claim for money to the government." *United States v. Southland Mgmt. Corp. (Southland I)*, 288 F.3d 665, 674 (5th Cir. 2002) *vacated on reh'g en banc on other grounds*, 326 F.3d 669 (5th Cir. 2003). The act reads, in relevant part:

> Any person who
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000,[6] plus 3 times the amount of damages which the Government sustains because of the act of that person
>
> . . .
>
> the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

31 U.S.C. § 3729(a).

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[6] Effective August 30, 1999, the minimum and maximum penalties were changed to $5,500 and $11,000 respectively. *See* 28 C.F.R. § 85.3(a)(9) (2007).

In order for the plaintiffs to prove liability under § 3729(a)(1), they must demonstrate that (1) LPT made a claim for payment or approval to an agency of the government; (2) the claim was false or fraudulent; and (3) LPT made the claim with the requisite scienter. *Southland I,* 288 F.3d at 675; *United States v. N. Am. Constr. Corp., et al.,* 173 F. Supp. 2d 601, 618 (S.D. Tex. Nov. 21, 2001) (Rosenthal, J.). Likewise, liability under § 3729(a)(2) may be proved upon a showing that (1) LPT made a record or statement in order to get a government agency to pay money; (2) the record or statement was false or fraudulent; and (3) LPT made the statement or record with the proper scienter. *Southland I,* 288 F.3d at 675. Additionally, most courts agree that to prove liability in a civil False Claims Act claim, the misrepresentations must have been material. *United States v. Southland Mgmt. Corp. (Southland II),* 326 F.3d 669, 679 n.3 (5th Cir. 2003) (Jones, J., concurring) (citing *United States ex rel. Costner v. URS Consultants, Inc.,* 317 F.3d 883 (8th Cir. 2003); *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 785, 788 (4th Cir. 1999); *Luckey v. Baxter Healthcare Corp.,* 183 F.3d 730, 732 (7th Cir. 1999); *United State v. TDC Mgmt. Corp.,* 24 F.3d 292, 298 (D.C. Cir. 1994)). Since in the instant case, the claims at issue are also statements or records, the inquiries for §§ 3729(a)(1) and(a) (2) are coterminous.

A. Claim For Payment

The Supreme Court has defined a claim as all "fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S. Ct. 959 (1968). There seems to be little dispute here as to whether LPT presented invoices based on the contracts at issue, and those invoices were paid. Accordingly, since a call has been made on the federal fisc, the first prong has been satisfied.[7] *See United States v. Inc. Village of Island Park*, 888 F.Supp. 419, 440 (E.D.N.Y. 1995) ("Fraudulent conduct and false statements remain inchoate until a claim for payment causing the government to disburse funds is made.") (citing *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950 (1958)).

B. That Was False or Fraudulent and Made With The Requisite Scienter

1. False

Much debate surrounds the meaning of the phrase "false or fraudulent claim." *See e.g., Harrison*, 176 F.3d at 785. However, in the civil version of the False Claims Act, the phrase is construed broadly. *Id.* "[T]he Court has consistently refused to accept a rigid, restrictive reading. . . ." *Neifert-White Co.*, 390

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[7] A claim that causes the government to disburse funds should not be confused with damages. Damages will be addressed later.

U.S. at 232 (internal citation and footnotes omitted). "Thus, any time a false statement is made in a transaction involving a call on the U.S. fisc, False Claims Act liability may attach." *Harrison,* 176 F.3d at 785. In the simplest terms a false claim is "[a]n assertion or statement that is untrue." BLACK'S LAW DICTIONARY 636 (8th ed. 2004). So, under this prong of the test, the question becomes whether the claims or statements are literally true. The parties do not dispute here whether the invoices themselves were factually correct. Instead the government argues that the invoices are tainted because they arise from a contract procured by false or fraudulent claims. Courts have recognized liability under the False Claims Act based on a fraudulent inducement theory.[8]

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[8] In 1999, the Fourth Circuit wrote an opinion regarding two ways that defendants could be held liable under the FCA despite having submitted accurate invoices: false certification and fraudulent inducement. *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 787-88 (4th Cir. 1999). False certification claims involve schemes where the receipt of federal funds is predicated on compliance with certain statutes. *Id.* For example in *United States v. Incorporated Village of Island Park,* the defendants were required to certify – among other things – that they had selected housing participants on a first-come, first-served basis. 888 F. Supp. 419, 440 (E.D.N.Y. 1995); *see also Peterson v. Weinberger,* 508 F.2d 45, 52 (5th Cir. 1975) (finding FCA liability for false certification when Medicare forms required the signature of the attending physician that he had personally attended or supervised their care, but were instead signed by another doctor). The Fifth Circuit recognizes false certification FCA liability provided "the government has conditioned payment of a claim upon a claimant's certification of

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compliance." *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997).

In a fraudulent inducement claim, "courts, including the Supreme Court, [have] found False Claims Act liability for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct." *Harrison*, 176 F.3d at 787 (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379 (1943)). These cases are frequently seen in a bid-rigging situation. *Id.*; *Hess*, 317 U.S. at 542-43. In *Hess*, the Supreme Court upheld FCA liability for a group of electrical contractors who conspired on their bids for work on Public Works Administration projects. *Hess*, 317 U.S. at 539.

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P.W.A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken, pressed ever to the ultimate goal-payment of government money to persons who had caused it to be defrauded.

Id. at 543-44.

The Fifth Circuit has recognized the fraud in the inducement theory under the FCA when dealing with bid-rigging. *See, e.g., United States ex rel. Laird v. Lockheed Martin Eng'g & Science Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007); *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 384 (5th Cir. 2003). In *Laird*, the most recent fraudulent inducement FCA Fifth Circuit case, the defendant Lockheed allegedly underbid a contract with NASA. *Laird*, 491 F.3d at 256-59. Lockheed submitted a bid based on specific man-hour parameters dictated by NASA. *Id.* at 257. The contract at issue was a cost-plus-award-fee ("CPAF") contract paying a base fee at the beginning of the contract and award fees based on contractor performance at regular intervals. *Id.* Under this particular CPAF contract, Lockheed's base fee was zero. *Id.* All awards were discretionary and determined by NASA. *Id.* "[I]f

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See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997). "[T]he falsity of a claim is determined *at the time of submission*." *Southland I*, 288 F.3d at 681 (emphasis in original). Accordingly, the inquiry narrows even further to examine whether the statements made in the proposals were literally true at the time the proposals were submitted.

2. Knowledge Under The FCA

"[I]t is impossible to meaningfully discuss falsity without implicating the knowledge requirement." *United States ex rel. Lamers v. City of Green Bay*, 168

Lockheed failed each award period, it earned nothing." *Id.* The Fifth Circuit discussed at length the uncertain nature of the bid process for this NASA contract, the in-built error in calculating man-hours due to NASA's unrealistic strictures, and the numerous other variables not under Lockheed's control. *Id.* The court then cited *Hess* for the proposition that

> to succeed on a fraud-in-the-inducement theory under the FCA, [plaintiff] must prove (1) that Lockheed had no intention to perform the research contract according to the terms of the [proposal]; and (2) that Lockheed obtained payments under the research contract to which it was not legitimately entitled. . . .
>
> Without more, a contract underbid is not a false claim. For FCA liability, there must be a nexus between the underbid and a request for payment that the contractor would not have been entitled to absent the contract.

Id. at *3 (internal citations omitted). The court concluded "[t]hat nexus is absent here." *Id.*

F.3d 1013, 1018 (7th Cir. 1999). Section 3729 expressly defines the scienter requirement under the False Claims Act to be a person who (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information. 31 U.S.C. § 3729(b). Moreover, the section requires "no proof of specific intent to defraud."[9] *Id.*

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[9] In the previous footnote, the court examined the Fifth Circuit's decision in *Laird*. In emphasizing the complete disconnect between Lockheed's bid and the actual work performed, the *Laird* court somewhat overstated the *mens rea* requirement under the FCA. However, the court clearly did not intend to change the scienter requirement under the FCA. The statute itself expressly states that "no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b). And, the weight of the case law states that the scienter requirement under the False Claims Act is (1) actual knowledge, (2) deliberate ignorance of the truth or falsity of the statement, or (3) reckless disregard of the truth or falsity of the information. *See e.g., Southland II,* 326 F.3d at 681 n. 7 ("A defendant may be liable for a civil false claim by 'knowingly' presenting such a claim, but specific intent to defraud is not required.") (internal citation omitted); *United States ex rel. Mathews v. Healthsouth Corp.*, No. 01-30862, 2002 WL 31687686 at *1 (5th Cir. 2002) ("To satisfy the intent element, it is sufficient to show that the defendant acted 'in deliberate ignorance of the truth or falsity of the information . . . [or] in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.'"); *see also Nat'l Athletic Trainers' Assoc., Inc. v. United States Dept. of Health & Human Servs.*, 455 F. 3d 500, 507 (5th Cir. 2006); *Burditt v. United States Dept. of Health & Human Servs.*, 934 F.2d 1362, 1374 (5th Cir. 1991). *Accord United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542, 544 (7th Cir. 1999)

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The statute expressly reaches three types of knowledge. *See United States v. Krizek,* 111 F.3d 934, 942-43 (D.C.Cir. 1997). The first type encompasses actual knowledge. *Id.* The second type – according to the relevant Senate Committee Report – contemplates "constructive knowledge" or "what has become known as the ostrich type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted." S. Rep. 99-345, at 20, U.S.C.C.A.N. 5266, 5285 (internal quotation marks omitted). However, the Committee Report further explained that although "at least some inquiry [must] be made, the inquiry need only be 'reasonable and prudent under the circumstances.'" *Id.* The duty is "a limited duty to inquire as opposed to a burdensome obligation." *Id.* The last type of knowledge has been described as "gross negligence plus". *Krizek,* 111 F.3d at 942 ("While the Act was not intended to apply to mere negligence, it is intended to

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("The mens rea element, 'knowingly,' requires that the defendant have actual knowledge of (or deliberately ignore or act in reckless disregard of) the truth or falsity of the information presented; *no specific intent to defraud is required.*"); *United States v. Krizek,* 111 F.3d 934, 941 (D.C.Cir. 1997) ("[R]eckless disregard lies on a continuum between gross negligence and intentional harm."). Moreover, *Laird* limits its statement to underbid situations. *Laird,* 491 F.3d at 260. Neither party has argued that LPT underbid costs in its proposals. But, *Laird* is applicable to the instant case in the sense that it reaffirms that a fraudulent inducement theory can impute "falseness" to otherwise accurate invoices in the Fifth Circuit.

apply in situations that could be considered gross negligence where the submitted claims to the Government are prepared in such a sloppy or unsupervised fashion that resulted in overcharges to the Government."). However "innocent mistakes, mere negligence, or even gross negligence (without more) are not actionable under the False Claims Act." *Lamers,* 168 F.3d at 1018. Courts have consistently found that innocently-made faulty calculations, flawed reasoning, and disputed legal issues arising from vague provisions or regulations cannot support liability under the FCA. *Southland II,* 326 F.3d at 682. (citing *United States ex rel. Siewick v. Jameson Sci. & Eng'g, Inc.,* 214 F.3d 1372, 1378 (D.C.Cir. 2000); *Lamers,* 168 F.3d at 1019; *Hagood v. Sonoma County Water Agency,* 81 F.3d 1465, 1478-79 (9th Cir. 1996); *United States ex rel. Wang v. FMC Corp.,* 975 F.2d 1412, 1420-21 (9th Cir. 1992)). "[T]he FCA is not an appropriate vehicle for policing technical compliance with administrative regulations." *Id.* (quoting *Lamers,* 168 F.3d at 1019). Reasoning that since § 3729(b)(2) already addresses willful blindness, and "no statutory provision should be construed as entirely redundant," the D.C. Circuit has explained that "it is logical to conclude that reckless disregard in this context is not a 'lesser form of intent,' but an extreme version of ordinary negligence." *Krizek,* 111 F.3d at 942 (quoting *Kungys v. United States,* 485 U.S. 759, 778, 108 S. Ct. 1537 (1988); *S.E.C. v. Steadman,* 967 F.2d 636, 641-42 (D.C.Cir. 1992)). Therefore, in order for the U.S. to prevail on its claims, it must demonstrate both that: (1) the statements or omissions were literally false at

the time they were made; and (2) LPT actually knew of, was willfully blind to, or acted with "gross negligence plus" regarding the falsity of those statements or omissions.

3. Specific Acts Alleged

In their motion for partial summary judgment, the plaintiffs allege five specific areas of falsity in LPT's SBIR proposals. Not every false statement applies to every contract. However, the plaintiffs argue that because a Phase II contract is not possible in the absence of a Phase I contract, a finding of falsity in either of the Phase I contracts taints the related Phase II contracts as well.

a. Corporate Status and History – Army Phase I

First, the U.S. claims that LPT "grossly misrepresented" its corporate status and history. Dkt. 67. Specifically, the U.S. alleges that LPT identified itself as a corporation although it was not incorporated until five months after the proposal had been submitted. *Id.* Additionally, the proposal made numerous references to the length of time LPT had been in business doing research. *Id.* In Section 2.0 of the Army Phase I proposal entitled Related Work, LPT stated

> Lithium Power Technologies, Inc. was founded in 1992 to conduct research and development on advanced lithium primary

> and secondary batteries . . . Over the years the company has relied on private funds and [has] developed extensive knowledge on numerous forms of advanced power sources . . .

Dkt. 67, Ex. 1 at 16. The U.S. argues that since LPT did not exist in 1992, it could not have been founded at that time, nor could it have developed extensive knowledge over the years as described in the proposal. LPT counters that LPT was the successor to a series of companies founded by Dr. Munshi and so was metaphysically – if not technically – founded in 1992. Moreover, LPT argues that both Munshi and Truong were listed in the proposal as still employed at Sulzer. Dkt. 84 at 11. And, the evaluation memorandum signed by Walter Maine pointed out that fact. Dkt. 67, Ex. 14(a). LPT argues that since the proposal clearly listed Sulzer as the employer of Munshi and Truong, the U.S. could not have believed that LPT had been in existence starting in 1992. Regardless, LPT cannot and does not argue that its corporate existence started before the proposal was presented to the government. Accordingly, these statements were not accurate statements of fact at the time made. Additionally, it is clear from LPT's response that Munshi had actual knowledge LPT was not incorporated until 1998. *Id.* at 10. At the very least, LPT admits that it acted in reckless disregard of the truth of the statement when it argues that "Dr. Munshi simply gave no thought to the date when he submitted the report." *Id.* Accordingly, the statements

regarding LPT's corporate status and history were literally false and made with the requisite scienter.

b. Key Personnel – Army Phases I & II, Air Force Phase II

Next, the U.S. argues that LPT misrepresented the key personnel it would use for three out of four of the contracts. Dkt. 67 at 20.

I. Dat Truong

For Army Phase I, LPT stated that "Dat Truong, a Biomedical Engineer at Sulzer Intermedics, Angleton, Texas, will assist in the experimental work." Dkt. 67, Ex. 1 at 18. However, LPT admits that Dat Truong was never employed by LPT and never did any research work for LPT. Dkt. 67, Ex. 5. But, LPT argues that Truong voiced his intention of investing in LPT and was involved in the initial set-up of the company. Dkt. 84, Ex. A. Therefore, LPT argues that its statement in the proposal was more of a forecast than a statement of present fact. Because the statement talks about a future event, it cannot be readily classified as true or false on its face. Its veracity depends on the state of mind of the person making the statement.

ii. Guoqiang Gao

In the Army Phase II Contract, the U.S. points to two misrepresentations regarding key personnel.

First, LPT represented that "Guoqiang Gao, Ph.D. has been interviewed for a scientist position and is expected to join LPT once the program start[s]." Dkt. 67, Ex. 2 at 40. The U.S. does not argue that LPT did not interview Gao. Instead, they argue that the statement is false because Dr. Gao never joined LPT and never did any research for LPT. LPT, on the other hand, argues that it did actually interview Gao and wanted to hire him. But, LPT claims that the time between the interview and the actual funding was so long that it lost the opportunity to hire Gao. Since the fact that LPT interviewed Gao is unrefuted based on the record, that part of the claim, at least, is literally true. However, the truth or falsity of LPT's stated intent to hire Gao is again dependent on the state of mind of the speaker.

iii. Mary Sukeshini

Likewise, for the second misrepresentation in Army Phase II, the U.S. quotes LPT saying "We have conducted a telephone interview with [Mary Sukeshini, Ph.D.] and if possible would like to hire her." *Id.* Again, the record would indicate that LPT interviewed Dr. Sukeshini, but the intent to hire her is a matter of the intent of the speaker.

iv. Like Xie

Lastly, the U.S. argues that LPT made another misrepresentation of key personnel in the Air Force Phase II proposal. As with the other alleged

misrepresentations, LPT stated that "Dr. Like Xie has been interviewed for a senior scientist position and is expected to join LPT once the program start[s]." Dkt. 67, Ex. 4 at 39. However, in this instance the U.S. adduced evidence that Xie was not interviewed until after the proposal was submitted. Dkt. 67, Ex. 10. LPT flatly contradicts this, claiming that Munshi interviewed Xie by phone. Dkt. 84. LPT avers Xie has forgotten. *Id.* Xie says in his affidavit that he had some contact prior to the proposal, but only with Longhi on behalf of LPT, not Munshi. Dkt. 67, Ex. 10. LPT offers email correspondence between Munshi and Xie dated after the proposal to demonstrate Xie was actively considering employment at LPT. *Id.* at Ex. A-6. However, both parties are clear that the in-person interview, the offer and all the ensuing correspondence took place after the proposal was submitted. *Id.*; Dkt. 86, Ex. A.

v. Knowledge

LPT claims that in all four instances, the delay between the submission of the proposal and the funding caused it to lose the chance to hire the intended personnel. And, there is no direct evidence in the record to show that LPT did not intend to hire these scientists. However, "direct evidence of a person's intent to deceive is rarely, if ever, available." *In re Powers,* No. 92-2437, 1992 WL 352557 at *2, 979 F.2d 1533 (5th Cir. 1992). Therefore in most instances involving fraud, the "jury may infer intent to defraud from all the facts and circumstances surrounding the

transaction in question." *United States v. Rabe,* No. 00-20018, 2001 WL 274736 at *2, 250 F.3d 743 (5th Cir. 2001) (citing *United States v. Aubrey,* 878 F.2d 825, 827 (5th Cir. 1989)).

The government argues, in effect, that LPT pulled a bait-and-switch with regard to key personnel. That is to say that LPT represented that it would hire specific well-qualified scientists for each contract, but instead hired lesser qualified scientists or even non-scientists instead. In one instance, LPT simply hired no one to replace the specified key person. Attempting to follow the trail of who was hired when to work on what is byzantine at best. However, certain facts emerge upon a review of the record. First, on three out of four funded proposals, the key personnel actually hired were not the same as the key personnel in the proposals. Second, no one was hired to replace Dat Truong on the Army Phase I contract.[10] Third, the Army Phase II contract employed Ph.D.'s during less than half of the time the work on the contract was being performed.[11] Fourth,

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[10] LPT claims that it hired Navor Hernandez to perform the work intended for Dat Truong on Army Phase I. Dkt. 102 at 12. However, it then describes Hernandez as having a "mechanical background," not as an engineer. *Id.* There is no doubt that if Hernandez's credentials had been nearly equivalent to Truong's, LPT would have adduced competent summary judgment evidence to that effect. It did not.

[11] Calculating that LPT represented it would hire two Ph.D.'s (Gao and Sukeshini) for the entire project, and the project took two years, then LPT represented that it would employ Ph.D's for a total of 48 months not counting Munshi.

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the Air Force Phase II proposal listed Dr. Gupta as key personnel, but he was fired very shortly thereafter.[12] Fifth, on August 27, 2001, Dr. Menon – one of the "replacement Ph.D's" – submitted a report in which he was critical of LPT's ethical practices with regard to (1) the integrity of the data presented to the government, and (2) false billing on the contracts. Dkt. 94, Ex. I-7 at RD-0377. Three days later on August 30, 2001, Menon's employment with LPT was terminated for attitude problems.[13] Dkt. 93, Ex. D at 5. Last, Dr. Xie's phone interview with Munshi – if there was one – was so insignificant that

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Counting the months worked by Ph.D.'s – except Munshi – during Army Phase II, the project was staffed by Ph.D.'s for 21 total months: Gupta worked 7 months, Menon worked 4 months, and Masere worked 10 months. That is approximately 43% of the total time spent on the contract. Alternatively, measuring the project as 24 months, then only 11 months out of the 24 were staffed with Ph.D.'s – except Munshi. In that scenario, the project was staffed with Ph.D.'s only 46% of the time. Either calculation results in the caliber of scientist represented in the proposal being present less than 50% of the time.

[12] The Air Force Phase II proposal is dated October 25, 2000 and lists Drs. Xie and Gupta as key personnel. Dkt. 67, Ex. 4 at 42. Gupta was terminated some time in November 2000. Dkt. 93, Ex. C ¶ 8.

[13] Notably, on December 2003, LPT terminated the employment of Dr. Coowar – another "replacement Ph.D." – also for attitude problems. Dkt. 93, Ex. E. And, Dr. Masere – a third "replacement Ph.D." – was officially warned that he would be terminated if his attitude did not improve. *Id.* at Ex. F. There is no evidence in the record regarding the arguments with Munshi referenced in both Coowar's termination letter and Masere's warning letter.

he could not remember it. And, that Xie's in-person interview was not conducted until after the submission of the proposal is unrefuted. The evidence certainly suggests that LPT pursued a course of conduct in its representations regarding personnel that was reckless as to the truth of those representations.

LPT argues that it intended to hire the key personnel listed in the proposals. If LPT had lost only one or even two people due to unforeseen circumstances, then it could be put down to bad luck or even negligence in ascertaining their availability. However, LPT repeatedly "lost the opportunity" to hire these scientists whose background suited the programs. And, LPT should have known enough to build in a margin for error because it was well-versed in the SBIR proposal process.[14] But, it continued to "lose opportunities." Summary judgment does not allow the court to weigh the credibility of the witnesses. *See Jones*, 427 F.3d at 993. And, the court must draw all *reasonable* inferences in favor of LPT as long as they are not improbable. *See T.I.G.*, 276 F.3d at 759. Based on the record before the court, there is some possibility that a reasonable jury could infer that LPT was merely negligent. Therefore, the court must find that there is a genuine issue of material fact regarding the U.S.'s key personnel argument.

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[14] LPT admitted that it had submitted at least 15 SBIR proposals by the end of 2002. Dkt. 67, Ex. 5 at 17.

However, even without these particular false statements the evidence in the record shows that there is no genuine issue of material fact as to the falsity of the proposals and the scienter with which they were made when taken as a whole.

c. Available Facilities and Equipment

The U.S. argues that LPT represented in Army Phase I that it already had office space, laboratories, and a "dry room." But, in actuality, the facilities were not yet built. In the proposal LPT stated "[t]he company occupies approximately 4000 square feet of new laboratory and office space, has a 500 square [foot] dry-room for the development and manufacture of lithium rechargeable batteries and capacitors." Dkt. 67, Ex. 1 at 20. The U.S. points to the fact that LPT's statements in the proposal were in the present tense. It argues that LPT represented that it "occupies" laboratory and office space and "has" a dry-room. Therefore, the U.S. concludes that the statement was false. Undeniably, the statement is literally false. In fact, there is some evidence in the record to suggest that the dry-room was not ready for quite some time after the proposal – despite LPT's statement and Munshi's affidavit to the effect that *all* of the facilities were ready when the proposal was funded. *See* Dkt. 102, Ex. B. *But see* Dkt. 93, Ex. C-2. As with LPT's corporate status, LPT readily admits that the buildings were not yet complete when the proposal was submitted. Dkt. 84 at 14. It argues instead that the facilities were in place at the time

the proposal was funded. If the question posed by the FCA was whether the U.S. got the product for which it contracted, then LPT's argument might have some traction. But, the focus of the FCA is on the truth of the statements to the government, not the end product. *See United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) ("The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency."). Therefore, the falsity of the statement is judged based on the time the statement was made. *Southland I*, 288 F.3d at 631. This is especially true when the false statements give the defendant an advantage over more deserving candidates. *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547, 586 (2006) ("The Government, and indirectly the American people [are] not required to be 'saddled' with contractors who used illegal means to win their contracts.") (citing *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 144-45, 87 S.Ct. 350 (1966)). And, LPT simply *must* have had actual knowledge that when it submitted the proposal, that its facilities had not yet been built. Therefore, the statement regarding the facilities that comprised LPT's offices and laboratories was literally and objectively false and made with actual knowledge of its falsity.

The U.S. also claims that LPT misrepresented the relationship it had – or did not have – with other laboratories in town. In all four contracts under the

section entitled Facilities/Equipment, LPT stated that "LPT has cooperative arrangements with University of Houston and Polyhedron Laboratories regarding the use of their laboratories and scientific equipment." Dkt 67, Exs. 1 at 20, 2 at 43, 3 at 22, & 4 at 43. The U.S. adduced competent summary judgment evidence showing that LPT had no cooperative fee agreement with University of Houston or Polyhedron – except on a fee for services basis. Dkt. 67, Exs. 11-13. In a stunning display of disingenuity, LPT responds that it never claimed to have a cooperative *agreement* with those labs, but rather a cooperative *arrangement*. LPT argues that an agreement and an arrangement are very different things. Indeed, it argues that the arrangement it had was to use facilities on a fee for service basis. Interestingly, in its earlier responses to interrogatories when asked to identify all persons at University of Houston and Polyhedron with any knowledge about the "cooperative arrangements," LPT replied that "[a]round the end of 1997, Lithium Power discussed possible cooperation in SBIR research with Professor Jacobsen at the University of Houston and Dr. Howard Kaye from Polyhedron." Dkt. 67, Ex. 6 at 1. It seems to be a bigger jump from "discussing possible cooperation" to "cooperative arrangements," than from "cooperative arrangements" to "cooperative agreements." In a different context, the Supreme Court has said "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92

S. Ct. 2294 (1972) (quoting *Amer. Commc'ns Assoc. v. Douds*, 339 U.S. 382, 412, 70 S. Ct. 674 (1950)). However, for the court's purposes, the common understanding of the word "arrangement" should suffice. Webster's Dictionary defines an arrangement as "an informal agreement or settlement." WEBSTER'S NEW COLLEGIATE DICTIONARY 82 (1977). LPT's argument – that *arrangement* and *agreement* are significantly different – simply cannot withstand common usage or even common sense. At the time that LPT submitted the proposals, no agreement or arrangement was in place with either Polyhedron or the University of Houston beyond fee-for-service like any other member of the public. Therefore, LPT's statements regarding all of its facilities – either owned or borrowed – were factually incorrect when made.

Although it could be argued that LPT had actual knowledge that it had no cooperative arrangement with Polyhedron or the University of Houston, at the very least LPT made these statements in reckless disregard for their truth. In his declaration, Munshi makes the following statements regarding the "cooperative arrangements."

> 23. We never represented to anyone that we had "cooperative agreements" with the University of Houston or Polyhedron Laboratories for the use of facilities. We represented that we had "cooperative arrangements," which is a different matter. In late 1997 or early 1998, I had telephone conversations with representatives of the

> University of Houston and Polyhedron Laboratories in which we discussed the use of their equipment and facilities. None of those discussions were ever reduced to an agreement or contract, and we never claimed otherwise. We did have cooperative arrangements, however. Exhibit A-5 shows a letter from Polyhedron Laboratories clearly indicating that contact between Dr. Kaye [of Polyhedron] and I was made relating to the SBIR proposals we were submitting to various DoD components.
>
> 24. During the course of our work under the various contracts, we never actually used the facilities at the University of Houston, and we used the services of Polyhedron Laboratories only a small number of times. Our own facilities proved to be sufficient. If we had needed those facilities, we undoubtedly would have entered into a more formal relationship.

Dkt. 84, Ex. A at 4-5. First, as detailed above, the choice of the word "arrangement" as opposed to "agreement" is a distinction without a difference. Second, in this statement Munshi admits that LPT had no formal "relationship" with the labs. And yet, in all four proposals LPT states that it "has cooperative arrangements with University of Houston and Polyhedron Laboratories regarding the use of their laboratories and scientific equipment." *See, e.g.*, Dkt. 67, Ex. 1 at 43. As proof of LPT's arrangement with Polyhedron, it offers a letter from the director of Polyhedron. Dkt. 84, Ex A-5. The letter is a pricing

sheet for services specific to polymeric liquids and solids. *Id.* Nothing in the letter suggests an arrangement/agreement other than a fee-for-service basis available to any customer of Polyhedron's. The fact that the letter references LPT's "proposal" in no way suggests an arrangement – informal or otherwise – with Polyhedron. *Id.* It is purely and simply a bid for services. And last, regardless of its relationship, if any, with Polyhedron, LPT offers nothing to show that it ever had any relationship with the University of Houston. In its response to interrogatories, LPT claims to have "discussed possible cooperation in SBIR research with Professor Jacobsen (sic) at the University of Houston . . . " Dkt. 67, Ex. 6 at 1. However, Professor Jacobson states in his declaration that

> To the best of my recollection, I have never conducted research with Mohammed Zafar A. Munshi or Lithium Power Technologies, Inc., nor do I recollect having discussions with Mr. Munshi regarding joint research between the University of Houston and Lithium Power Technologies, Inc.

Dkt. 67, Ex. 13. True to form, LPT counters that it never represented that it was "conducting joint research" with the University of Houston. Dkt. 84. Even if the court were to accept LPT's strained definition of "cooperative arrangement" as something less than a "cooperative agreement" – which it does not – this "arrangement" would still be substantial enough that Dr. Jacobson would remember some

conversation with LPT. The fact that he does not indicates that any contact LPT had with Jacobson was insignificant enough not to meet even LPT's definition of an "arrangement." Therefore, the court concludes that LPT's statements regarding its "cooperative arrangements" with both Polyhedron and the University of Houston were false at the times they were made. And, at the very least the statements were made with reckless disregard of their falsity, if not actual knowledge.

d. Essentially Equivalent and/or Related Work – Air Force Phase I & II

Finally, the U.S. argues that LPT misrepresented in the Air Force Phase I and II proposals whether it had previously performed similar or related work. There are several places in the proposals where the applicant is asked about similar and/or previous work product.

i. Submitted to Other Agencies

The proposal cover sheets for Air Force Phase I & II asks the applicant whether "this proposal [has] been submitted to other U.S. government agencies, or DoD components or other SBIR activity." Dkt. 67, Ex. 3. On both proposals, LPT answered in the negative. *Id.* LPT argues that it answered correctly, because the Army and Air Force proposals were not the *same* proposal. And certainly they were not identical

proposals, so this is literally accurate as of the time the statement was made.

ii. Related Work

Additionally, the solicitation instructions required applicants to include a section entitled "Related Work." *Id.* at Ex. 8. The instructions for that section stated:

> **Describe significant activities directly related to the proposed effort,** including any conducted by the principal investigator, the proposing firm, consultants, or others. Describe how these activities interface with the proposed project and discuss any planned coordination with outside sources. The proposal must persuade reviewers of the proposer's awareness of the state-of-the-art in the specific topic.
>
> **Describe previous work not directly related to the proposed effort but similar.** Provide the following: (1) short description, (2) client for which work was performed (including individual to be contacted and phone number), and (3) date of completion.

Id. (emphasis added). Under the "Related Work" sections of both proposals, LPT made no mention of the Army contracts. *See Id.* at Exs. 3 & 4. Interestingly, LPT makes no attempt to argue that the proposals are not similar. Dkt. 84. In fact, LPT freely admits in its pleadings and in evidence

adduced for summary judgment that "the Air Force proposals were directly related to the [Army] contracts, in that the Air Force proposals were an extension of the technology developed in connection with the [Army] contracts." Dkt. 84; *see also id,* Ex. A; Dkt. 93. Instead, LPT makes three arguments: (1) the solicitation did not require LPT to list the Army proposals, (2) the Air Force already knew about the Army proposal, and (3) the language of the proposal solicitation and the examples published on the government's website were so vague that LPT did not realize it should disclose the Army proposals. These arguments are unavailing.

First, LPT claims that the Air Force's instructions did not require LPT to list the Army proposals. In support of this argument, LPT quotes the full first paragraph from the instructions as set forth above. LPT argues that it complied with the instructions providing a short description of its prior work. Moreover, LPT claims that the instructions did not require the disclosure of prior *contracts.* Instead, LPT explains that the Related Work section "simply directed Lithium Power to persuade the reviewers of its knowledge of the state-of-the-art." Dkt. 84. And, the last sentence of the first paragraph of the Related Work instructions supports that interpretation to the extent that *one* of the goals of the Related Work section is for "[t]he proposal [to] persuade reviewers of the proposer's awareness of the state-of-the-art in the specific topic." Dkt. 67, Ex. 8. However, even accepting *arguendo* this interpretation as true, a

review of LPT's Related Work sections for the Air Force Phase I and II proposals reveals that the section speaks not one word of LPT's past work in the area. Dkt. 67, Ex. 3 at 16. It discusses the novelty of the batteries and posits their scientific value. It forecasts possible uses for the technology. Finally, LPT states its intention to use polymeric materials developed by another lab. But, notably missing is any discussion whatsoever of LPT's or Munshi's past related work in the field. In reality, the directions clearly require LPT to disclose the Army contract, because the very first sentence of the instructions directs applicants to "[d]escribe significant activities directly related to the proposed effort, including any conducted by the principal investigator, the proposing firm, consultants, or others." Dkt. 67, Ex. 8a. Only an artificially cramped reading of these instructions could produce the paragraph penned by LPT.

Moreover, even if the first paragraph did not indeed require disclosure of the Army proposals, the second paragraph – artfully omitted by the defendants – leaves no doubt. It requires the disclosure of any previous work not directly related but similar. Dkt. 67, Ex. 8a. Further it specifically requires that the applicant provide a short description of the similar work and the name(s) and contact information of the client for whom the work was performed. *Id.* LPT admits that the work is related and its argument that the instructions did not require its disclosure is unavailing.

For its second argument, LPT presents what has come to be known as the "government-knowledge-defense." This defense is a means by which the defendant can rebut scienter based on the government's advance knowledge that the claim is false. *Southland II,* 326 F.3d at 682 n.8. However, in the Fifth Circuit, government knowledge does not automatically vitiate an FCA claim. *See United States ex rel. Barrett v. Johnson Controls, Inc.*, No. 3:01-CV-1641-M, 2003 WL 21500400 (N.D.Tex. Apr. 9, 2003) ("Thus, if the [government knowledge] principle applies in this Circuit, it does so only in the rare circumstance when the government effectively directs the defendant to make the statement alleged to be false."). In *Southland I,* the court explained that while some of its sister circuits had recognized the defense, it found "it difficult to justify the proposition that an individual who submits a false claim to the government with knowledge of its falsity should necessarily be excused from liability under the Act merely because the government was also aware that the claim was false when it was submitted." *Southland I,* 288 F.3d at 686. Moreover, the court explained that even those circuits that allowed the defense did not see it as an automatic bar. *Id.* (citing *Kreindler,* 985 F.2d at 1156-57; *United States ex rel. Hagood v. Sonoma County Water Agency,* 929 F.2d 1416, 1421 (9th Cir. 1991)). "[D]efendant's knowledge of the falsity of its claim . . . is not automatically exonerated by any overlapping knowledge by government officials." *Kreindler,* 985 F.2d at 1156. So, for LPT to successfully use the defense, it must show that the government not only

knew about the Army Phases I & II proposals, but that it directed LPT to disregard the solicitation instructions and not disclose the prior related work.

LPT argues that the Air Force knew about the prior research and therefore LPT did not need to disclose it. In Munshi's affidavit, he testifies that he gave two presentations to the Air Force regarding his work on Army Phase I. Dkt. 84, Ex. A. The first presentation was in March 1999 at Eglin Air Force Base in Florida. *Id.* There he discussed further development of the technology with Scott Roberson[15] and Captain Jeffries of the Air Force. The second presentation was at Wright-Patterson Air Force Base where he discussed MEMS sensor technology with David Ryan, who would later be the technical reviewer on his Air Force Phase I proposal. *Id.* As proof of the Air Force's knowledge LPT points to a letter dated October 14, 1999 Munshi sent to Dr. Richard Marsh at Wright-Patterson Air Force Base along with attached information regarding batteries. Dkt 84, Ex. A-3 & A-4. The letter informs Marsh that Munshi will be coming to Wright-Patterson Air Force Base in November to give a presentation. And, in the information, Munshi references the fact that the battery technology is being developed "with partial assistance from BMDO under an SBIR Program." *Id.*

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[15] Scott Roberson was the Team Leader and Research Engineer at the Intelligent Fuzing-Air Force Laboratory at Eglin Air Force Base who reviewed LPT's Army Phase I proposal. Dkt. 67, Ex. 14.

at A-4. Additionally, LPT references a letter that Munshi wrote to Ryan in January of 2000 as a follow-up to the presentation.[16] The letter states:

> Dear David:
>
> I just wanted to take this opportunity to thank you for participating in the battery presentation I made at WPAFB last November. You wanted to see an SBIR proposal from our Company and I did manage to submit one on the solid-state lithium polymer electrolyte battery for MEMS and other applications, entitled "High Energy Density Micro-Power Sources".
>
> Please look out for it. I believe if any technology is going to be truly feasible for microsensors, it has to be based on a solid-state technology. Thanks and I hope we can work on the project together if we can obtain the contract. Best wishes.
>
> Yours sincerely,
> M. Zafar A. Munshi, Ph.D.
> President

Dkt. 102, Ex. B-2. Ryan has no recollection of attending the presentation. Dkt. 93, Ex. H. LPT also argues that Munshi's email to Captain Jefferies at Eglin Air Force Base regarding the Army Phase I

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[16] The date on the letter is October 14, 1999, but according to Munchi's [sic] affidavit, that is in error. Dkt. 102, Ex. B. The actual date is January 12, 2000. *Id.*

report and Army Phase II proposal shows knowledge on the part of the Air Force. Dkt. 84, Ex. A-2. Even if the court credited all of LPT's evidence of the Air Force's alleged knowledge, it shows only overlapping knowledge on the part of the Air Force. And, that is simply not enough to negate knowledge under the government-knowledge-defense as interpreted in this circuit.

For its last argument, LPT claims that it "did not understand the instructions to require the disclosure of prior contracts, and in fact the instructions contain no such requirements." Dkt. 84 at 34. LPT further argues that the solicitation instructions are vague, and therefore reasonable minds could differ over what should be included. *Id.* The court disagrees. The solicitation instructions direct applicants to disclose both "activities directly related to the proposed effort" and "previous work not directly related to the proposed effort but similar." Dkt. 67, Ex. 8a. LPT must have thought that the Army Phase I project was sufficiently similar for Munshi to send an abstract about it to Dr. Marsh in his October 1999 letter. Dkt. 84, Ex. A-3. LPT must have thought the technologies were sufficiently related to list its Army Phase II contract in its commercialization report for the Air Force Phase II report. *Id.*, Ex. A ¶ 16. Moreover, Munshi describes the Air Force project as "a further development of the technology that we had used in the [Army] contracts," an extension of the Army technology to MEMS application, and having some common elements. *Id.* at ¶¶ 12, 16, 39, 42 & 43. And

yet, LPT invites the court to believe that it did not know it should disclose the Army contracts because they were not sufficiently related, or alternatively, that LPT did not understand the meaning of either "activities directly related" or "previous work not directly related but similar." The court declines the invitation. If LPT did not understand the instructions in the solicitation, then its struthian behavior is the paradigm of "deliberate ignorance of the truth or falsity of the information" identified in the statute. *See* 31 U.S.C. § 3729(b)(2). Accordingly, LPT knowingly made false statements when it failed to disclose the Army Phase I & II contracts in the Related Work section of the Air Force Phase I & II proposals.

iii. Similar Proposals or Awards

The solicitation instructions further directed applicants to include a section entitled "Prior, Current, or Pending Support of Similar Proposals or Awards" as follows:

> *Warning* – While it is permissible, with proposal notification, to submit identical proposals or proposals containing a significant amount of essentially equivalent work for consideration under numerous federal program solicitations, it is unlawful to enter into contracts or grants requiring essentially equivalent effort. **If there is any question concerning this, it must be disclosed to the soliciting agency or agencies before award.**

> If a proposal submitted in response to this solicitation is substantially the same as another proposal that has been funded, is now being funded, or is pending with another Federal Agency or DoD Component or the same DoD Component the proposer must so indicate on Appendix A and provide the following information:
>
> . . .
>
> *Note: If Section 3.4.1 does not apply, state in the proposal "No prior, current or pending support for proposed work."*

Id. at Ex. 8 (some emphasis added). Under the "Similar Proposals and Award" sections of both Air Force Proposals, LPT wrote "No prior, current, or pending support for proposed work." Dkt. 67, Exs. 3 & 4. The U.S. argues that the Air Force proposals were similar enough to the Army proposals to trigger disclosure. The language of the instructions calls for disclosure of work that either (1) is identical, or (2) contains a significant amount of essentially equivalent work. Dkt. 67, Ex. 8a. The U.S. does not argue that the work is identical. Instead, it argues that the work was essentially equivalent or at least related enough to trigger disclosure. In support of this claim, the U.S. points to a series of similarities between the proposals. First, the technical objectives of both reports are strikingly similar. LPT describes the language of the two sections as "boilerplate" and

admits that they contain "similar language."[17] Dkt. 84, Ex. A. However, LPT argues that the proposals involved different types of batteries with different specifications and different production processes. *Id.* Second, the U.S. argues that the deliverables under Army Phase II and Air Force Phase II were essentially identical. Dkt. 67. Below is the deliverables language from Army Phase II. Phrases and words not present in Air Force Phase II are bolded. Language from Air Force Phase II is in brackets where it would appear.

> In addition to the final report, periodic **monthly** reporting will be made with the contracting technical monitor to apprise on the progress. It is expected that in the latter half of the project, **sufficient full-size, 18650** [a sufficient number of] solid-state lithium polymer electrolyte battery prototypes will be fabricated and at least **25** [50] samples of the best prototypes will be provided to the agency for independent evaluation of performance. We will also make a determined effort early in the program to provide the agency, a few good quality, but very thin film small size-small footprint lithium polymer batteries which they could test in some MEMS application. In this case we will contact the appropriate personnel at

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[17] LPT admits that "during the summer of 2002, LPT submitted at least 15 SBIR Phase I proposals to various government agencies." Dkt. 67, Ex. 5 at 17. Some similarity among the proposals was inevitable.

> the agency for systems requirements before constructing these cells.

Compare Dkt. 67, Ex 2 at 27 *with* Dkt. 67, Ex. 4 (punctuation and grammar errors in original). Despite the admitted similarities between the two proposals, LPT argues that "the government's arguments . . . are based on superficial similarities," and "[a] substantive review of the contracts reveals that the government is simply wrong." Dkt. 84. Both sides present distinguished experts to give credence to their arguments regarding the similarities of the proposals. *See* Dkts. 94, Ex. E & 84, Ex. E. Without being able to assess the credibility of the two experts, it is nearly impossible to ascertain whether the projects are as the U.S.'s expert argues significantly similar, or are closer to LPT's expert evaluation and merely normal, acceptable, and not significant by any measure. Because the court is in no position to determine if the proposals contained essentially equivalent work, at this point LPT's failure to disclose the Army proposals to the Air Force cannot be determined to be true or false.

4. That Was Material

"The accepted definition of materiality for civil FCA claims, as for other federal statutes, equates materiality with 'ha[ving] a natural tendency to influence or [being] capable of influencing, the decision of the decision making body to which it was addressed.'" *N. Am. Constr.*, 173 F. Supp. 2d at 618 (quoting *Kungys v. United States*, 485 U.S. 759, 770,

108 S. Ct. 1537 (1988)). To demonstrate that LPT's false statements were material, the U.S. provided the declarations of the scientists who evaluated the Army Phase I and Air Force Phase I proposals. The Army Phase I contract was evaluated by Scott Roberson. Roberson states in his declaration that he generally considers proposals in their entirety and that factors beyond the work the applicant sought to perform play a role in the evaluation process. Dkt. 67, Ex. 14. The picture that he received of LPT based on its whole proposal was of an experienced company with its own laboratory space, and cooperative arrangements with the University of Houston and Polyhedron Laboratories. *Id.* In his declaration, he further stated that "[a]ny variation as to what was presented to me in the proposal would have changed my evaluation." *Id.* He went on to list five factors that influenced his decisions. *Id.*

1. LPT was incorporated;
2. LPT had been in business since 1992;[18]
3. LPT had 4,000 square feet of "occupied" laboratory space and a 500 square foot dry room,

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[18] LPT argues that in Army Phase II and Air Force Phase I and II it corrected the founding date to read 1998 and still received funding. Therefore, LPT reasons that the founding date of 1992 in the Army I proposal could not have been material. However, what the reviewers thought when they approved the later contracts has no bearing on what the reviewer thought when he evaluated the first proposal.

4. LPT had cooperative agreements with the University of Houston and Polyhedron Laboratories to be able to use their laboratories and scientific equipment, and

5. LPT had employee(s) to assist in the laboratory research and fabrication of the deliverables.

Id. Notably, four out of five of his listed factors can be determined for summary judgment purposes to have been knowingly false. Additionally, Roberson attached the evaluation form and memorandum regarding the proposal that he submitted at the time. *Id.* at 14(a). The attached memorandum mentions that "[t]he company has adequate facilities to conduct this project."[19] *Id.*

LPT argues that Roberson was not the final authority regarding the funding of the contract. It claims that Jeff Bond – the SBIR Program Manager for the BMDO – was the person who made the ultimate decision regarding funding. In Bond's declaration, he stated that he alone could make the decision to fund a contract. Dkt. 84, Ex. D. Further, he stated that factors such as incorporation and business history are not proper evaluation criteria and did not

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[19] The memorandum is actually written by Walter O. Maine, Chief of the Munitions Division. Dkt. 67, Ex. 14(a). Although he is not mentioned by either party, he clearly was another reviewer of LPT's proposals, and specifically cited LPT's facilities as a factor in his evaluation. *Id.*

influence his decision to fund LPT's proposal. *Id.* He argued that Roberson should not have looked to other factors outside the official evaluation criteria.[20] *Id.* However, his deposition clarifies his role in the selection process. First, Bond processed approximately 400 proposals per year. Dkt. 93, Ex. A-5. He did not have technical expertise in all of the areas in which proposals were submitted, and not in the particular area of batteries. *Id.* at Ex. A-7 & A-8. He had a pool of 300 or so evaluators to whom he would assign proposals for evaluation. *Id.* at A-5. Notably, he admitted that he relied strictly on his evaluators with respect to funding the LPT proposal. *Id.* at A-8. Additionally, Bond agreed that the history and connections of an applicant can "beef up" the credentials of a company. *Id.* at A-4. And, Bond stated that if Roberson said that he was influenced by certain factors, then Roberson was telling the truth. *Id.* In fact, Bond admitted that evaluators would look at the proposal as a whole when making their recommendations.[21] *Id.* at A-2. Finally, Bond stated that not only

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[20] LPT argues in several different contexts that the allegedly false information was not required and therefore not material. Whether they were required statements, they were nonetheless made in an effort to sway the reviewers. And, if the statements did sway the reviewers then they are material, required or not.

[21] Bond stated that he did not disagree with the current program administrator's assessment of the evaluation process. Dkt. 93 at A-3. The present administrator – Michael Caccuitto – describes the factors that reviewers take into consideration when evaluating proposals, including facilities and equipment,

(Continued on following page)

does he rely strictly on his evaluators, he has never funded a proposal when the evaluators did not recommend the project. *Id.* at A-6. Therefore, although Bond had the ability to actually fund the contract, he played little role in the technical evaluation of the proposal. Since Roberson was influenced by LPT's misrepresentations, and Bond would have been influenced by Roberson's recommendation, Bond was influenced – albeit indirectly – by LPT's misrepresentations. Even if – as Bond states in his declaration – Roberson should not have considered criteria like corporate history and facilities, the standard for materiality is whether those factors *could* influence the decision maker, not whether they *should*. Accordingly, LPT's misrepresentations on the Army Phase I were material.

The evaluator for the Air Force Phase I and II proposals was Dr. David Ryan. In Ryan's declaration, he makes clear that he also evaluated the proposals as a whole, including the same factors listed by Roberson. Dkt. 67, Ex. 15. He made special mention of the cooperative agreements with the University of Houston and Polyhedron as something that impressed him extremely. *Id.* Additionally, he understood that the proposal was unique and novel and based his recommendation, in part, upon that

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owned or borrowed by agreement, and similar or related work. Dkt. 67, Ex. 8. Because the reviewer does not have time to verify the information in a proposal, it is imperative that the applicants' proposals be completely truthful. *Id.*

understanding. *Id.* Before making his declaration Ryan reviewed the Army contracts. *Id.* He stated that the two proposals were similar enough that if LPT had disclosed the Army contracts, Ryan would not have recommended funding the Air Force contracts. *Id.* Therefore, LPT's omission in not disclosing its Army contracts was crucial and material to the decision to fund the Air Force Phase I and II. Accordingly, the U.S. has offered ample summary judgment evidence that the misrepresentations not only could have been material, but were actually material.

5. Damages

Lastly, LPT argues that it cannot be liable under the False Claims Act because the government "got what it paid for" and therefore suffered no damages. LPT argues that the U.S. is using the fraudulent inducement theory to avoid the damages question altogether. However, damages are not a necessary element for any type of successful FCA claim – fraudulent inducement or not. *Rex Trailer Co. v. United States,* 350 U.S. 148, 152-53 (1956); *United States v. Miller,* 645 F.2d 473 (5th Cir. 1981); *see also Columbia/HCA,* 20 F.Supp.2d at 1047 *Accord United States ex rel. Bahrani v. Conagra, Inc.,* 465 F.3d 1189, 1203 (10th Cir. 2006); *Harrison,* 176 F.3d at 785; *United States v. Hughes,* 585 F.2d 284, 286 n.1 (7th Cir. 1978). Therefore, this argument fails.

IV. Conclusion

The government has unquestionably carried its burden of proof, even under the movant's difficult summary judgment standard, on several false statements contained in the contracts. For example, LPT misrepresented its history and status on the Army Phase I proposal. Also on the Army Phase I proposal, LPT misrepresented the physical facilities that it had. On all four proposals, LPT continuously misrepresented the arrangements – or lack thereof – between itself and Polyhedron Laboratories, and itself and the University of Houston. On the Air Force Phase I and II, LPT misrepresented the amount of related work it had performed prior to the Air Force proposals when it did not disclose the prior Army contracts. At one point in its motion LPT argues that the U.S. has made a mountain out of a group of small molehills. But, that encapsulates exactly the overall misrepresentation that LPT made in its proposals. It embellished a whole series of molehills so it could present a mountain of experience, facilities, and novelty to attract the reviewers. All of this was done with at least reckless disregard for the truth of the statements, and in some cases actual knowledge. The court finds that the defendants made false claims in violation of sections 3729(a)(1) and (2) on the contracts designated as Army Phase I, Air Force Phase I, and Air Force Phase II. Therefore, the invoices based on all four contracts at issue here are "false claims" based on a fraudulent inducement theory.

Accordingly, for the foregoing reasons, the plaintiffs' motion for partial summary judgment is GRANTED. Dkt. 68.

In light of the court's ruling here, defendants' cross-motions for partial summary judgment are DENIED. Dkts. 83 & 89.

The court will issue a scheduling order for briefing on damages and deadlines for those claims not resolved here concurrent with this opinion.

It is so ORDERED.

Signed at Houston, Texas on September 27, 2007.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
EX REL. ALFRED J. LONGHI, JR.,	§	
Plaintiffs,	§	
	§	CIVIL ACTION
v.	§	H-02-4329
LITHIUM POWER TECHNOLOGIES, INC.,	§	
AND MOHAMMED ZAFAR A. MUNSHI,	§	
Defendants.	§	

MEMORANDUM OPINION ON SUMMARY JUDGMENT

(Filed Mar. 23, 2007)

Defendants Lithium Power Technologies, Inc. and Mohammed Zafar A. Munshi (jointly and interchangeably referred to as "LPT" or "Munshi") bring this motion for summary judgment with respect to the *qui tam*[1] claims of the relator Alfred J. Longhi ("Longhi" or "relator") brought against them under 31 U.S.C. §§ 3729-3733, the federal False Claims Act ("FCA"). Dkt. 91. "[T]he FCA imposes civil liability upon 'any person' who, inter alia, 'knowingly presents,

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[1] *"Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means 'who pursues this action on our Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone." *Vt. Agency of Natural Res. v. United States, ex rel. Stevens,* 529 U.S. 765, 768 n.1, 120 S. Ct. 1858, 1860 n.1 (2000) ((Scalia, J.) (*citing* 3 W. BLACKSTONE, COMMENTARIES at 160)).

or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.[2]" Defendants allege that "[r]elator lacks standing to assert his claims in this lawsuit," because he purportedly executed a release agreeing not to sue LPT and indemnify defendants if he did. Dkt. 36 ¶ 166. After a review of the applicable standard for summary judgment, the litigants' arguments addressing relator's claims and the applicable law, defendants' motion for summary judgment on relator's claims based on the release is DENIED. Dkt. 36.

I. Factual Background

In 1997, Relator invested $130,000 to purchase a 8.4% stake in LTP. Dkt. 27 at 4. This stake equated to 12,083 shares in LPT common stock. Dkt. 27 at 4, Dkt. 37, EX. 2 at 1. The shares were issued to The Kathleen M. Longhi Living Trust (the "Trust"). Dkt. 37, EX. 2, at 1. While Longhi signed the stock sale agreement as trustee of the Trust, it is unclear from the record whether Longhi was a beneficiary of the Trust. Dkt. 92 at 8-9, *but see* Dkt. 37, EX. 2 at 1 (Defendant Munshi stating that "it is my understanding that Mr. Longhi was the trustee and *possibly* a beneficiary of the Trust.") (emphasis added).

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[2] *Id.*

In March 2000, Relator joined LTP [sic] as an employee. Dkt. 27 at 4. During his employment relator claims he became aware of defendants' alleged scheme to defraud the government in contracts solicited by LTP [sic] under the federal Small Business Innovation Research Program ("SBIR"). Dkt. 27. On November 18, 2002, relator filed his action under seal, as is required by the FCA. Dkt. 27 at 4; Dkt. 36 at 1. Eleven days later, on November 29, 2002, the Trust executed a stock sale and conveyance agreement, selling its 12,083 shares to Munshi's wife for $80,000. Dkt. 91, EX.2. In conjunction with the stock sale agreement, relator purportedly executed a general release as well as a covenant agreeing not to sue LPT. *Id.* On December 17, 2002, the government obtained a search warrant. Dkt. 96 at 3-4. The United States, after a lengthy investigation, which it suggests did not start in earnest until about December 17, 2002, ultimately chose to intervene in the matter almost 3 years later in 2005. *Id.* at 4.

II. STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The party moving for summary judgment must demonstrate that there are no

genuine issues of material fact. *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986); *Fordoche, Inc. v. Texaco, Inc.*, 463 F.3d 388, 392 (5th Cir. 2006). An issue is "material" if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248; *Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 502 (5th Cir. 2001), cert. denied, 122 S. Ct. 347 (2001).

The moving party bears the initial burden of informing the court of all evidence demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Only when the movant has discharged this initial burden, does the burden shift to the non-moving party to demonstrate that there is a genuine issue of material fact. *Id.* at 322. If the moving party fails to meet this burden, then it is not entitled to a summary judgment and no defense to the motion is required. *Id.*

In responding to a properly supported summary judgment motion, the non-movant cannot merely rely on its pleadings, but must present specific and supported material facts, of significant probative value, to preclude summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11, 106 S. Ct. 1348 (1986); *Guillory v. PPG Indus., Inc.*, 434 F.3d 303, 309 (5th Cir. 2005). In determining whether a genuine issue of material fact exists, the court views the evidence and draws infer-

ences in the light most favorable to the non-moving party. *See Anderson,* 477 U.S. at 255; *Richardson v. Monitronics Int'l, Inc.,* 434 F.3d 327, 332 (5th Cir. 2005).

III. Analysis

The court finds the release unenforceable for the following reasons. First, the release is invalid because of public policy demands and the pro-plaintiff posture of the FCA. Second, the release is also invalid under the plain language of the FCA. Statutory construction suggests that a release entered into during the proscribed 60-day investigatory period unduly interferes with the United States' exclusive and unilateral right during that time to evaluate whether to join the *qui tam* action. Defendants argue that the release should be analyzed under contract law. Even in the event that the court performed such a review, the defendants have not met their burden for summary judgment.[3] However, such an analysis here would be

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[3] Because the record evidences that there is a genuine issue of material fact as to who signed the release agreement, or if Longhi received any consideration as an individual, if he indeed was an individual signatory, this court will not analyze this case under contract or trust law. Even if we were to apply contract law, it is unclear from the record before the court whether Longhi signed the stock sale agreement in his individual capacity or on behalf of the Trust. Movants have the burden to prove that relator signed in his individual capacity or at a minimum, as a beneficiary of the Trust. Defendants have not done so. Accordingly, summary judgment cannot be rendered.

contrary to the federal common law principles expressed in *Town of Newton v. Rumery,* 480 U.S. 386, 107 S. Ct. 1187 (1987). Therefore, the court declines the invitation. In addition, defendants' counterclaim for breach of contract and indemnification must collapse under the same analysis as the release, because one cannot exist without the other. And finally, case law squarely on point suggests that any indemnification of a *qui tam* defendant by the relator fails as a matter of law.

1. The Enforceability of Longhi's Release

A. The Public Policy Rationale

"The qui tam provisions of the False Claims Act create incentives for potential whistle blowers to assist the government to discover fraud against the taxpayers." *United States v. United States ex rel. Thornton,* 207 F.3d 769, 771 (5th Cir. 2000) (*citing* Hall). "The FCA allows a private citizen with *special knowledge* of fraud against the government to commence suit in the name of the government." *Id. (citing* 31 U.S.C. § 3730(b)(1) (1999)) (emphasis added). As the United States correctly points out, it is in the public interest to protect the federal treasury and ensure the integrity and honesty of those that receive payments from the government. Dkt. 96 at 12. Enforcement of the release would run counter to this public policy and serve to potentially shield those who allegedly commit fraud against the United States. *Id.*

(i) Applying *Town of Newton v. Rumery*[4]

Under federal common law "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstance by a public policy harmed by enforcement of the agreement." *Rumery*, 480 U.S. at 392. Courts have applied *Rumery* to a broad spectrum of pre- and post-filing releases of *qui tam* claims entered into without the United States' knowledge or consent. *See, e.g. United States ex rel. Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272 (D. Colo. 2002) (denying defendants' motion to dismiss and finding a pre-filing release invalid because the government only started investigating the matter *a number of weeks after* the filing of the *qui tam* action), *rev'd on other grounds*, 465 F.3d 1189 (10th Cir. 2006); *Brown v. City of South Burlington*, 393 F.3d 337, 338 (2d Cir. 2004) (analyzing a pre-filing release related to a *qui tam* action under contract law but allowing the case to go to trial to determine whether the release had been obtained under duress); *United States ex rel. Gebert v. Worldwide Technology, Inc.*, 260 F.3d 909 (8th Cir. 2001) (distinguishing its facts from *Green* and finding a pre-filing release of a *qui tam* claim in a bankruptcy estate valid); *United States ex rel., Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997) (upholding a pre-filing release because the government had already *fully and extensively* investigated the allegations for

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[4] 480 U.S. 386 (1987).

approximately two years prior to the filing of the *qui tam* action and for some time subsequent to the filing, and based on its findings, had declined to intervene); *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 956, 969 (9th Cir. 1995) (finding a pre-filing release invalid).

As defendants correctly state, *Rumery* has two prongs that must be satisfied in order for this common law exception to apply: (1) public policy must actually be harmed by enforcement of the release at issue, and (2) public policy must outweigh the interest in enforcing the release. Dkt. 92 at 19. Defendants further argue that plaintiffs have not met their burden of proof under *Rumery*. *Id.* As the discussion below will show, the plaintiffs – assuming they did indeed have this burden – have met it.[5] The

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[5] Although defendants cite no support for their proposition that *Rumery* places the burden of proof on plaintiffs, the court assumes defendants are relying on Justice O'Connor's concurrence in the *Rumery* plurality opinion. *Rumery*, 480 U.S. at 399. In particular, defendants likely refer to Justice O'Connor's specific disagreement with, and narrowing of, Part III-B of the plurality opinion. *Id.* at 401. Justice O'Connor specifically allocates the burden of proof to the person wishing to make certain releases unenforceable. *Id.* However, if we choose to accept Justice O'Connor's narrow construction of *Rumery*, we must accept it *in toto*. The test she proposes only addresses the narrow universe of release-dismissal agreements under § 1983. *Id.* Her 3-prong test allows "defendants in a § 1983 suit [to] establish that a particular release executed in exchange for the dismissal of criminal charges, was (i) voluntarily made, (ii) not the product of prosecutorial overreaching, and (iii) in the public interest." (numbering added) Justice O'Connor is in fact carving out a

(Continued on following page)

public policy at issue applies not only to Longhi as an individual, but also covers the universe of all future relators. Public policy is meant to view the forest, not the trees. The public interest implicated here is the ability of the government to obtain information from relators it could not otherwise obtain. *See Hall,* 104 F.3d at 233. It was precisely the government's – and by extension the public's – interest in gaining full information from the relator that made the *Green* court hold the release unenforceable. *Green,* 59 F.3d at 968. In *Green,* the relator had already filed – and settled – various state law claims with his former employer and others. *Id.* at 966. Subsequently, and after signing a release as part of that settlement, Green filed a *qui tam* action. *Id.* at 966 & n.11. Had the release been enforced, the government would not have had the opportunity to fully investigate the matter. *Id.* As the *Green* court succinctly noted, "if the release [would] be enforced, [the potential relator would] have no right or reason to file a *qui tam* claim. *Id.* at 965." As a result, the "deterrent objectives" of the FCA would be significantly undermined. *Id.* In *Hall,* on the other hand, a full-blown investigation

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right for state actor defendants. Her reasoning does not extend to releases between *qui tam* relators and defendants.

Additionally, the RESTATEMENT (SECOND) OF CONTRACTS clearly allocates the "balancing" of public policy determinations regarding enforceability of contracts or clauses to the court and does not discuss an allocation of the burden of proof to a specific party. RESTATEMENT (SECOND) OF CONTRACTS § 178 cmts. b & c (1981).

conducted by the government found no substantiation for the *qui tam* allegations, and the government chose not to intervene; therefore the public policy prong requiring invalidation of the release was not implicated. *Hall,* 104 F.3d at 233. In fact, the *Hall* court made this very clear when it stated that it "deemed the question of the government's lack of knowledge 'critical'" to its decision. *Id.* This case factually resembles *Green.* Longhi had not given the government all the information it needed in order to determine whether to intervene prior to the execution of the release. Dkt. 96 at 3. In fact, the United States had barely begun its investigation when Longhi filed his *qui tam* lawsuit. *Id.* According to the United States, "Longhi's assistance, and that of his counsel, were extremely important when it came time for the United States to make an informed intervention decision." *Id.* Almost three years later, on September 14, 2005, the United States ultimately intervened. *Id.* at 4. The public policy objectives here clearly outweigh the defendants' interest in enforcing the release. If this type of release were enforced, effective fraud investigations under the FCA would be acutely compromised. *Cf. Hall* 104 F.3d at 233 (emphasizing that the enforcement of a release turns on whether the government has had ample opportunity to investigate the allegations). Without a relator's participation, the government would often be unable to hold accountable those who violate the FCA and defraud this nation's taxpayers and its government. *See id.* Defendants suggest a solution to this problem: Simply enforce the release, but allow the government to hire the relator

as a "consultant." Dkt. 92 at 28. This suggestion is ill-informed and demonstrates a fundamental misunderstanding of basic *qui tam* policy. To do as defendants suggest would undermine Congress's fundamental intent behind the Act, i.e. giving the relator a *personal* stake in the claim, which varies according to his or her level of participation. *Green*, 59 F.3d at 958 (citing *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748-49 (9th Cir. 1993)).

Moreover, defendants are disingenuous when they declare that *Green* draws a bright line between pre-filing and post-filing releases. Dkt. 92 at 24-26. According to defendants, pre-filing releases may be held unenforceable, while post-filing releases must be enforced as a matter of law. *Id.* The court is not persuaded by this argument. If there is a dividing line to be found between *Hall* and *Green*, it is the fullness of the government's investigation, not the timing of the release. These two cases must be regarded merely as data points on the broad spectrum of the *Rumery* federal common law test. In fact, a careful reading of *Hall* and *Green* reveals that since they both technically implicate pre-filing releases, they would not support defendants' position anyway. *See generally Hall*, 104 F.3d 230 (*Hall* was technically a post-government notification but pre-*qui tam* action filing case). Moreover, the Supreme Court in *Rumery* rejected any type of *per se* rule pertaining to releases outright. *Rumery*, 480 U.S. at 392. As stated above, Longhi is precisely the kind of person the FCA seeks to empower and shelter. Longhi is a private citizen

with special knowledge of alleged fraud. To enforce the release against him would not only ignore the public policy objectives Congress has expressly spelled out in the FCA, it would disincentivize future relators. Conversely it would also encourage those guilty of fraud on the United States to insulate themselves from the reach of the FCA by simply forcing potential relators to sign general releases. The court will not let that happen. This case illustrates why the Supreme Court in *Rumery* refused to provide a bright line rule. The government absolutely could not have gone forward without the co-operation of the relator. To enforce this release would not only have a chilling effect on the government's ability to investigate FCA fraud, but also on its ability to rely for support on those who have special knowledge of the fraud perpetrated on the United States – the relators.

(ii) Applying *Hall*

Defendants advocate that *Hall* is squarely on point. Nonetheless, the actual application of the *Hall* test to the case at bar – contrary to what defendants suggest – supports this court's conclusion that Longhi's post-filing release is unenforceable. *Hall* mandates that a release be upheld if the defendant proves that (1) the federal government had *full knowledge* of the plaintiff's charges before the release was executed, and (2) the federal government had *already investigated* the allegations prior to their release. *Hall* 104 F.3d at 232-32. In this case, the government has unambiguously stated that without relator's extensive

support subsequent to November 29, 2002, (the date of the release), it could not have issued a search warrant or made sense of the documents procured thereby. Dkt. 96 at 3-4. Defendants fail the first prong of *Hall* because there exists at least a material issue of fact as to the government's having "full knowledge" of the charges. Defendants also fail to establish the second prong. Because the government did not obtain the requisite documents to allow it to investigate the alleged false claims until approximately five weeks *after* the action was filed, the government had clearly not had the opportunity to "investigate" the allegations prior to their supposed release. Without relator's extensive involvement in the official investigation into defendants' actions, which lasted from 2002 to 2005, when the government ultimately decided to intervene, the government could not have developed "full knowledge" of the alleged violations of the FCA. Defendants therefore have failed to demonstrate that the government had fully investigated the matter or even had full knowledge of the alleged fraud prior to the execution of the release, as is required under *Green/Hall*. *See generally Bahrani*, 183 F. Supp. 2d 1272 (applying the *Hall* test accordingly).

B. Statutory Construction

In addition to the policy reasons to find the release unenforceable, the statute itself and its related legislative history also militate against enforcing such a release. Subsection (b)(1) of 31 U.S.C. § 3730 authorizes a private person to bring a civil

action for a violation of Section 3729 on behalf of the Government. "The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. § 3730(b)(1). In addition, subsection (b)(2) requires the complaint to be filed under seal and that "substantially all material evidence and information the person possesses shall be served on the Government." 31 U.S.C. § 3730(b)(2). The complaint must "remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." *Id.* The 60-day period does not begin until both the complaint and the material evidence are received. *See* S. REP. No. 99-345, at 23 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288. The Government may extend this 60-day evaluation period by a showing of good cause to a court. 31 U.S.C. § 3730(b)(3). "The initial 60-day sealing . . . has the same effect as if the *qui tam* relator had brought his information to the Government and had notified the Government of his intent to sue. The government would need an opportunity to study and evaluate the information in either situation." S. REP. No. 99-345, at 24, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5289.

Relator signed the release of his claims 11 days after he had filed his *qui tam* complaint under seal. This 11-day period falls squarely within the government's 60-day statutory evaluation period. *Accord*

Green, 59 F.3d at 959 (acknowledging that *settlements* during the initial sixty-day period can only be dismissed "if the court and Attorney General give written consent for the dismissal and their reasons for consenting") (original emphasis omitted; court's own emphasis added). The government states that its investigations into Longhi's allegations did not begin in earnest until December 17, 2002, exactly 29 days after the complaint was filed. Dkt. 96 at 3. Even if the release were valid, the relator could not have entered into it at the time he did, without the *express knowledge and consent* of the United States, because the government's actions were still governed by its statutory 60-day review window. Relator never received such express written consent, and defendants have failed to meet their burden of proof in providing even a shred of evidence that the government would have granted such a request. In fact, based on the government's response to the defendants' motion for summary judgment, it is clear that the government would not have granted such a request. Dkt. 96. It is the government's prerogative to establish when it has received all material information pertinent to the matter. The government's filings indicate that the 60-day period may not even have been triggered until on or about December 17, 2002. Dkt. 96 at 4. A release signed during that 60-day window would eviscerate congressional intent affording the United States the opportunity to investigate – for sixty days at a minimum – in peace. Therefore, to give effect to the 60-day seal and investigation period in the statute, absent other circumstances not present here, a release

signed during § 3730(b)'s 60-day period is presumptively invalid.

In addition, the Fifth Circuit, as well as the Sixth Circuit, have held that a "relator may not seek voluntary dismissal of any qui tam action even extending beyond the 60-day intervention window."[6] *Searcy v. Philips Electronics of N. Am. Corp.*, 117 F.3d 154, 159 (5th Cir. 1997) (holding that Section 3730(b)(1) "plainly allows the government to veto proposed settlements"); *United States v. Doyle*, 207 F.3d 335 (6th Cir. 2000) (same). *Searcy* refers to settlements rather than releases. *Searcy*, 117 F.3d at 159. But, the basic effect of a settlement and a release are the same insofar as they relate to the position of the parties to the action. Therefore, the holding in *Searcy* can be applied to releases as well. Precisely because the relator is so critical to the government's

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[6] Contrary to relator's claim that the action does not belong to relator, the Fifth Circuit has expressly held that relator is a party to the suit. "Where an FCA suit is initiated by a private person . . . the text of the statute explicitly states that although the suit is 'brought in the name of the Government,' the action is brought for the person and for the Government." *United States ex rel. Patricia Laird v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346 (5th Cir. 2003) (citing 31 U.S.C. § 3730(b)(1)); *accord United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279, 289 n.16 (5th Cir. 1999) ("Our own circuit precedent describes the United States as 'a' real party in interest rather than 'the' real party in interest."); *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772-73, 120 S. Ct. 1858, 1862 (2000) (finding that "the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery").

ability to investigate an action brought under the FCA, and its decision whether or not to join, a relator should not be able to withdraw from participation in the action for at least this preliminary 60-day period, unless requested to do so by the United States.[7] To allow the nullification of the relator – either voluntary or involuntary – clearly violates the public policy objectives outlined above, as well as the broad power to reject a settlement granted to the United States in *qui tam* actions.

2. Defendants' counterclaims

In the instant case, defendants bring a counterclaim for breach of contract and indemnification.[8] A citizen's obedience to the law – state and federal – is a clearly mandated public policy of every state. *Cf., e.g., Brandon v. Anesthesia & Pain Mgmt. Associates, Ltd.*, 277 F.3d 936 (7th Cir. 2002). "The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff." *Mortgages, Inc. v. U.S. Dist. Court for*

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[7] *Searcy* clearly grants a much broader right to the United States, which extends far beyond the initial 60-day period, namely through the entire term of a *qui tam* action. The court need not stretch its application of *Searcy* so far since the release in the instant case was executed well within the 60-day period.

[8] Defendants also bring a counterclaim for breach of fiduciary duty. Since, unlike defendants' other counterclaim, the fiduciary duty claim is not implicated by the policy objectives regarding the enforcement of the release, the court will not address it.

Dist. of Nevada (Las Vegas), 934 F.2d 209, 213 (9th Cir. 1991). This principle has been firmly embedded in this nation's *qui tam* jurisprudence for sixty years. In a seminal 1947 case, the district court for the Southern District of New York dismissed a *qui tam* defendant's counterclaim seeking indemnification for potential FCA liability, because to "permit a counterclaim ... would set a precedent that would be a strong deterrent to the institution of genuine informer's actions ... [A] sensible application of the qui tam statute should bar the plea of a counterclaim against the informer." *Rodriquez v. Weekly Publications,* 74 F. Supp. 763, 764 (S.D.N.Y. 1947). A multitude of courts addressing this very issue, have echoed this holding. *See, e.g., Israel Discount Bank Ltd. v. Entin,* 951 F.2d 311, 315 (11th Cir. 1992) ("[T]here is no right to indemnity ... under the FCA."); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.,* No. 99-3298, 2004 WL2009413, *7 (D.D.C. May 17, 2004) (defendants "do not have any rights to indemnity ... under the FCA"); *United States ex rel. Public Integrity v. Therapeutic Technology, Inc.,* 895 F. Supp. 294, 297 (S.D. Ala. 1995) ("[Q]ui tam defendants lack a right to bring claims that will have the effect of offsetting FCA liability."); *United States v. Nardone,* 782 F. Supp. 996 (M.D. Pa. 1990). Congress purposefully intended the litigation structure under the FCA to be uniquely pro-plaintiff. *See United States ex rel. Abbott-Burdick v. Univ. Med. Assocs.,* No. 2:96-1676-12, 2002 U.S. Dist. LEXIS 26986, at *19-20 (D.S.C. 2002).

Defendants assert that relator has breached an agreement with LTP [sic] and is contractually obligated to indemnify LTP [sic] for (a) all costs and expenses incurred in the defense of this lawsuit, (b) all sums recovered by the United States from Lithium Power in this lawsuit, and (c) consequential damages to LTP's [sic] business arising from this lawsuit. Dkt. 36 at ¶¶ 172, 173. Defendants' counterclaim for breach of contract and indemnification is precisely the type of indemnification *qui tam* defendants should be denied as a matter of public policy. Therefore, as a matter of law, defendants' counterclaim for contribution and indemnification will be dismissed.

IV. Conclusion

After reviewing the arguments of the parties, the summary judgment record, and the applicable law, the defendants' motion for summary judgment on relator's claims based on the release is DENIED. The defendants' counterclaim for breach of contract and indemnification is DISMISSED WITH PREJUDICE.

Signed at Houston, Texas on March 23, 2007.

/s/ Gray H. Miller
Gray H. Miller
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20194
also filed in
No. 08-20306

United States of America, ex rel,
ALFRED J LONGHI, JR

Plaintiff-Appellee

UNITED STATES OF AMERICA

Intervenor-Appellee

v.

LITHIUM POWER TECHNOLOGIES INC;
MOHAMMED ZAFAR A MUNSHI

Defendants-Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Sept. 8, 2009)

Opinion 07/09/09, 5 Cir., ___, ___, F.3d ___)

Before HIGGINBOTHAM, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

Order on pet for reh EB-REHG4A

31 U.S.C. § 3729 (Prior to Amendment in May 2009).

False Claims.

(a) Liability for Certain Acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or

employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains

because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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31 U.S.C. § 3730 (Prior to Amendment in May 2009).

Civil Actions for False Claims.

(a) Responsibilities of the Attorney General. – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government

may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the Parties to Qui Tam Actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)

(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the

Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting

the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the

defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses. – The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this

section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.